

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. **278**

THE UNITED STATES

vs.

THE MIDWEST OIL COMPANY ET AL.

FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

FILED NOVEMBER 10, 1913.

(23901.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 750.

THE UNITED STATES

vs.

THE MIDWEST OIL COMPANY ET AL.

FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption.....	a	1
Transcript from the District Court of the United States for the District of Wyoming.....	1	1
Caption.....	1	1
Bill of complaint.....	1	1
Temporary petroleum withdrawal No. 5.....	8	8
Order of withdrawal, petroleum reserve No. 8.....	9	9
Præcipe for subpoena for the defendant the Midwest Oil Co.....	11	10
Præcipe for subpoena for the defendants the Reed Investment Co. et al....	11	10
Subpoena and marshal's return.....	11	11
Affidavit of J. H. Favorite for the United States.....	13	12
Motion for service upon nonresident defendants.....	14	13
Order for service upon nonresident defendants and marshal's return....	15	13
Motion for an order extending time to file answer.....	16	15
Order extending time to file answer.....	17	15
Motion to dismiss bill of complaint.....	17	15
Order setting hearing on motion to dismiss.....	19	17
Order resetting hearing on motion to dismiss.....	19	17
Order of argument on motion to dismiss.....	20	18
Order of submission of motion to dismiss.....	20	18
Certified copy of telegram, Ballinger to Acting Secretary Pierce, Interior Department, Sept. 26, 1909.....	21	18
Certified copy of telegram, Frank Pierce, Acting Secretary, to Secretary of Interior, Sept. 27, 1909.....	23	20
Certified copy of communication, H. C. Rizer, acting director, to the Secretary of the Interior, Sept. 27, 1909.....	24	21
Decree, June 14, 1913.....	24	21
Petition for appeal.....	25	22
Order allowing appeal.....	25	22
Assignment of errors.....	26	22
Citation and acceptance of service.....	26	23
Præcipe for transcript.....	27	24

	Original.	Print.
Clerk's certificate to transcript.....	28	24
Memorandum opinion of district court.....	29	25
Appearance of Messrs. Hilliard S. Ridgely and W. E. Mullen as counsel for the appellant.....	32	27
Appearance of Mr. Ernest Knaebel as counsel for the appellant.....	32	27
Appearance of Messrs. Vaile, McAllister & Vaile as counsel for the appellees.....	33	27
Appearance of Messrs. Schuyler & Schuyler as counsel for the appellees..	33	27
Order of submission.....	33	28
Order to file and record certificate of questions to Supreme Court of the United States.....	34	28
Memorandum as to certificate of questions to Supreme Court of the United States	34	28
Clerk's certificate to transcript.....	35	28
Order granting motion to bring up whole record and cause, etc.....	36	29

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September term, 1913, of said court, before the Honorable William C. Hook and the Honorable John E. Carland, circuit judges, and the Honorable Arba S. Van Valkenburgh, district judge.

Attest:

[SEAL.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court of Appeals
for the Eighth Circuit.*

Be it remembered that heretofore, to wit, on the twenty-eighth day of June, A. D. 1913, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the United States of America is appellant and The Midwest Oil Company, et al., are appellees, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to wit:

1 [2] Pleas in the District Court of the United States for the District of Wyoming, sitting at Cheyenne.

Be it remembered that heretofore and on, to wit, the fourteenth day of February, in the year of our Lord one thousand nine hundred and thirteen (1913), came The United States of America and filed in said court its bill of complaint, and sued out and under the seal of said court a subpoena in chancery against The Midwest Oil Company, The Reed Investment Company, The Fitzhugh Oil Company, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed.

And said bill of complaint is in words and figures as follows, to wit:

[3] In the District Court of the United States for the District of Wyoming.

United States of America, plaintiff,

No. 733. vs. In Equity.

The Midwest Oil Company, The Reed Investment Company, The Fitzhugh Oil Company, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, defendants.

The United States of America brings this, its bill in equity, against The Midwest Oil Company, The Reed Investment Company, The Fitzhugh Oil Company, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, and thereupon complains and alleges:

I.

This suit is brought under the authority and by the direction of the Attorney General.

II.

The defendant, The Midwest Oil Company, is a corporation organized under the laws of the former Territory of Arizona, and now existing under the laws of the State of Arizona, and is a resident and citizen of that State.

The defendant, The Reed Investment Company, is a corporation organized and existing under the laws of the State of Colorado, and a resident and citizen of that State.

The defendant, The Fitzhugh Oil Company, is a corporation organized and existing under and by virtue of the laws of the State of Arizona, and is a resident and citizen of that State.

2 The defendants, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, are each and all residents and citizens of the State of Colorado, and their respective Christian names [4] are unknown to the plaintiff.

III.

The plaintiff now is, and ever since the Louisiana Purchase of 1803 has continuously been, the owner of certain land situate in the county of Natrona, in the State of Wyoming, and described as follows, to wit: The northeast quarter (NE. $\frac{1}{4}$) of section eleven (11) of township thirty-nine (39) north of range seventy-nine (79) west of the sixth principal meridian. The said land contains large and valuable deposits of petroleum and is chiefly valuable therefor; but no minerals of value, other than the said deposits of petroleum, have thus far been discovered within the said land.

IV.

On September 27, 1909, the Secretary of the Interior, acting in that behalf with the approval and pursuant to the direction of the President, duly and lawfully made and promulgated a certain order in writing, entitled "Temporary petroleum withdrawal number 5," whereby the said land, in common with many other tracts of the public lands of the United States, was withdrawn from mineral exploration and from any form whatsoever of location, settlement, selection, filing, entry, occupation, possession, purchase, or acquisition under the public-land laws, or any thereof; and the said order has never been retracted or set aside; but, on the contrary, the same now is, and at all times since the aforesaid date thereof, has continuously remained in full force and effect. A copy of the said order of withdrawal, omitting only the descriptions of lands not involved in this suit, is hereto attached and made a part of this bill.

By the act of Congress entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910 (36 Stat. L., 847, 848), it was and is provided as follows:

[5] Sec. 1. That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes, to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.

3 Sec. 2. That all lands withdrawn under the provision of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, That this act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act: And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; [6] but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: And provided further, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

On July 2, 1910, there was made and promulgated, by and with the approval of the President, a certain order in writing, styled "Order of withdrawal, petroleum reserve, No. 8, whereby the said order of September 27, 1909, was expressly ratified, confirmed, and continued in full force and effect, and the tract of land hereinbefore described, along with many others belonging to the public domain, was declared to be withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject only to the provisions, limitations, exceptions, and conditions of the act of Congress above set forth. The said order

of July 2, 1910, now is, and ever since the said date thereof has continuously remained, in full force and effect. A copy thereof, omitting only the descriptions of lands not involved in this suit, is hereto attached and made part of this bill.

V.

On March 27, 1910, William G. Henshaw, Hetty T. Henshaw, Tyler Henshaw, William M. Fitzhugh, Mary E. Fitzhugh, Harry Chickering, Alla S. Chickering, and Henry D. [7] Nichols (who, for brevity, will hereafter be referred to collectively and intended by the term "original claimants"), in defiance of the first aforesaid order of withdrawal and in violation of the proprietary rights of the plaintiff, unlawfully entered and trespassed upon the said described land, and then and there unlawfully, and without any license or authority from the plaintiff, commenced to drill a well for the purpose of exploring the said land and premises for petroleum, and thereafter the said unlawful drilling operations were there continued by the said original claimants until they had caused the said well to be sunk to a great depth and had therein encountered and thereby rendered subject to ready extraction large deposits of petroleum of great commercial value within the said described parcel of land.

Prior to March 27, 1910, neither the said original claimants, nor any of them, nor the defendants above named, nor any of them, nor any other person or persons whomsoever, had ever explored the said described land, or any part of it, for the purpose of discovering petroleum, gas, or any other mineral or minerals whatsoever, or had ever undertaken or caused to be commenced or performed work of any kind for the purpose of any such exploration, or had ever occupied or claimed the said described land, in whole or in part, as petroleum land or otherwise; nor was any actual discovery of petroleum or of any other mineral ever made within the limits of the said described land until subsequent to March 27, 1910, and on, to wit, May 5, 1910, on which last-mentioned date plaintiff avers, on information and belief, the deposits of petroleum were encountered, as aforesaid, within and by means of the said well.

VI.

On May 4, 1910, the said original claimants caused to be filed for record and recorded, in the records of the said county of Natrona, a certain writing bearing date March 10, [8] 1910, purporting to be signed in their respective names, and purporting to be a location certificate evidencing a claim and location by them of the said described land as petroleum placer-mining claim under and in pursuance of the mining laws of the United States.

VII.

Plaintiff is informed by the defendants and therefore alleges that at some time or times subsequent to July 2, 1910 (when the second of the said orders of withdrawal was made as aforesaid), the said

original claimants, through divers written instruments by them made and delivered, assigned and transferred all such right, title, or interest as they or any of them ever had or claimed in or to the said described land, by virtue of the said pretended location or otherwise, to certain of the defendants; and for this reason the plaintiff has not joined the said original claimants as parties defendant in this cause. The plaintiff, however, expressly reserves its right to join the said original claimants as parties defendant hereto, in case it should hereafter be made to appear that they, or any of them, still claim an interest in the subject matter of this suit, or are or have been responsible for any of the wrongs, injuries, and conversions hereinafter mentioned; and it hereby disclaims any purpose or intention whatsoever to waive any cause of action which it may have against them, or any of them, at law or in equity, or any right to pursue the same either in this jurisdiction or within the State of California, where, it is informed, the said original claimants reside.

The plaintiff is not sufficiently informed concerning the nature or purport of the said written instruments, or any of them, to describe the same more fully than as above set forth, but alleges that the said instruments are in the possession of the defendants, and are subject to be fully disclosed by them in this suit.

VIII.

[9] Each of the defendants claims to have some interest in the said described land and in the petroleum therein contained or derived therefrom; but their said claims are all wholly based upon and derived from the aforesaid pretended location and instruments made and delivered by the original claimants as aforesaid, purporting to transfer and assign rights in the said land pretended by them to have been acquired by virtue of the said pretended location and by the drilling of the said well; and the plaintiff avers that the said pretended location was and is violative of the said orders of withdrawal and the act of Congress above set forth, and was and is absolutely null and void, and that neither the original claimants, nor any of them, nor the defendants, nor any of them, now has, or ever acquired, any right, title, or interest in the said described land, or any part of it, or any right to extract petroleum from the same or any part of it; and that all and singular the claims of the defendants in the premises are illegal and of no force or effect whatsoever against the plaintiff.

6 The plaintiff is not sufficiently informed on the subject to define further the several and respective claims and pretenses of the defendants, but seeks in this suit a full discovery thereof.

IX.

In the month of October, 1911, the defendant, The Reed Investment Company, acting by and with the consent and at the instigation

of the other defendants, wrongfully and unlawfully took possession of the said described land and of the said oil well, and ever since so taking possession the said last-named defendant has been continuously operating the said oil well, without the plaintiff's consent, and has thus extracted from the said land large quantities of petroleum, to wit, more than fifty thousand barrels thereof, of a value of more than one dollar per barrel.

Plaintiff alleges, upon information and belief, that the oil so taken has been and is being in large part refined by [10] the defendants, or some of them, and that all of the said oil has been and is being from time to time by them disposed of to divers persons to the plaintiff unknown, for large sums of money, and that the defendants have reaped and are continuing to reap large pecuniary profits from the aforesaid tortious taking of oil from the said described land, and the conversion thereof to their own use, as aforesaid.

X.

During the month of December, 1911, and at divers dates thereafter, this plaintiff made due demand upon the defendants and each of them that they and each of them vacate said land and surrender the possession thereof to this plaintiff and cease committing trespass and waste thereupon, and particularly as to the petroleum deposited therein; but notwithstanding the premises the defendants and each of them have at all times refused and still refuse to vacate said land or surrender the possession thereof to this plaintiff or to cease committing trespass and waste thereupon, and said defendants still continue, and threaten to, and unless restrained therefrom will continue, to extract petroleum from said land and appropriate the same to their own use and benefit, and otherwise commit trespass and waste upon said land, to the great and irreparable injury of this plaintiff.

XI.

The present value of the land hereinbefore described exceeds two hundred and fifty thousand dollars.

In consideration whereof, and for isasmuch as plaintiff is without full, adequate, and complete remedy in the premises, 7 save in a court of equity, and to the end that the said defendants, The Midwest Oil Company, The Reed Investment Company, The Fitzhugh Oil Company, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, and each of them, make full, true, and direct answer to all and singular the matters [11] and things herein set out, as fully as if they had been particularly interrogated thereunto, but not under oath (an answer under oath being hereby expressly waived); and to the end that said defendants and each of

them may be adjudged and decreed to have no estate, right, title, interest, or claim in or to said land or any part thereof or any of the minerals therein contained; and that said land and all thereof and all of the minerals contained may be adjudged and decreed to be the property of the plaintiff, free and clear of all claims asserted by the defendants, or any of them; and that each and all of the defendants, their officers, agents, servants, and attorneys, during the progress of this suit, and thereafter finally and perpetually may be enjoined from asserting or claiming any right, title, or interest in or to the said land or any part thereof or any of the minerals therein contained; and that each and all of the defendants, their officers, agents, servants, and attorneys, during the progress of this suit, and thereafter finally and perpetually, may be enjoined from going upon any of said land, and from in any manner using any of said land, and from in any manner removing or using any of the minerals deposited in said land or any part thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon said land or any part thereof, or with reference to any of the minerals deposited therein or any of the other natural products thereof; and that an accounting may be had by said defendants and each of them wherein said defendants and each of them shall make a full, complete, itemized, and correct disclosure of the quantity of petroleum, or other natural products, removed or extracted by them or either or any of them from said land or any part thereof, and of any and all moneys or other property, rents, and profits received by them or either or any of them from the use or sale of petroleum or other products taken from said land or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in the premises; and that plaintiff may have such other and further relief as in equity may seem proper.

May it please the court to grant unto the plaintiff a writ of subpoena issued by and under the seal of this honorable court, directed to said The Midwest Oil Company, The Reed Investment Company,

8 The Fitzhugh Oil Company, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, thereby commanding them and

each of them, at a certain time and under a certain penalty therein to be limited, to appear before this honorable court, and then and there full, true, and direct answer make to all and singular the premises, and stand to, perform, and abide by such order, direction, and decree as may be made against them or any of them in the premises and as shall be meet and agreeable to equity.

HILLIARD S. RIDGELY,

United States Attorney.

B. D. TOWNSEND,

Special Assistant to the Attorney General.

[13] Department of the Interior.

United States Geological Survey.

Washington

101960

CAH

Oct. 5/09 to R. & R. Visalia,
Oakland, Sacramento & Los
Angeles, & Buffalo & Doug-
las, Wyo.

Office of the director.
Received Glo
Sep. 28, 1909.

September 27, 1909.

The honorable,

The Secretary of the Interior.

Sir:

In accordance with your orders I have the honor to submit the following recommendation, which covers approximately 3,041,000 acres, of which the larger part is probably private land and not affected by this withdrawal.

Temporary petroleum withdrawal No. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

9

Wyoming.

(Sixth principal meridian.)

T. 39 N., R. 79 W.

Very respectfully,

H. C. RIZER,
Acting Director.

Approved September 27, 1909, and sent to General Land Office.

FRANK PIERCE,
Acting Secretary,
E. S. F.

[14] Department of the Interior,
62443

United States Geological Survey, Received G. L. O. Jul. 9, 1910.
Washington.

Office of the director.

July 1, 1910.
Ex. Order of Modification 8,
22/11
See Douglas 05428

Right of way Natrona Pipe Line, etc., Co. W. P. W.

The honorable,

The Secretary of the Interior.

Sir:

In accordance with your instructions I recommend the withdrawal for classification and in aid of legislation affecting the use and disposition of petroleum deposits belonging to the United States of the following areas in the State of Wyoming, involving approximately 255,461 acres:

Order of withdrawal.

Petroleum reserve No. 8.

It is hereby ordered that those certain orders of withdrawal made heretofore:

On Sept. 27, 1909, and described as temporary petroleum withdrawal No. 5;

On Oct. 12, 1909, and described as temporary petroleum withdrawal No. 6;

10 On Oct. 12, 1909, and described as temporary petroleum withdrawal No. 7;

On Oct. 30, 1909, and described as temporary petroleum withdrawal No. 8;

On Feb. 12, 1910, and described as temporary petroleum withdrawal No. 13;

On April 8, 1910, and described as temporary petroleum withdrawal No. 14;

On June 18, 1910, and described as temporary petroleum withdrawal No. 17;

in so far as the same include any of the lands hereinafter described, be, and the same are hereby, ratified, confirmed, and continued in full force and effect; and subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910, there is hereby withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation

affecting the use and disposal of petroleum lands belonging to the United States, all of those certain lands of the United States set forth and particularly described as follows, to wit:

[15] (Sixth principal meridian, Wyoming.)

T. 39 N., R. 79 W., secs. 11, 12, and 13.

Very respectfully,

GEO. OTIS SMITH,
Director.

July 1, 1910.

Respectfully referred to the President with recommendation that same be approved.

R. A. BALLINGER,
Secretary.

Approved July 2, 1910,
and referred to the Secretary of the Interior.

WM. H. TAFT,
President.

11 Referred to the Commissioner of the General Land Office for appropriate action.

FRANK PIERCE,
Acting Secretary.
DMC

Endorsed: Filed in the District Court on Febry. 14, 1913.

[16] (Praeipe for Subpoena for the Defendant the Midwest Oil Co.)

The clerk will issue a subpoena in equity in the above-entitled cause, for service upon the Midwest Oil Company, a corporation organized under the laws of the State of Arizona, and the Fitzhugh Oil Company, a corporation organized and existing under the laws of the State of Arizona, returnable twenty days from the issuing thereof.

HILLIARD S. RIDGELY,
Attorney for Plaintiff.

To CHARLES J. OHNHAUS, *Clerk.*
Cheyenne, Wyoming, Feb. 14th, 1913.

Filed in the District Court on Feb. 14, 1913.

[17] (Praeipe for Subpoena for the Defendants the Reed Investment Co., et al.)

The clerk will issue a subpoena in equity in the above-entitled cause, for service upon the Reed Investment Company, a corporation organized and existing under the laws of the State of Colorado,

and O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, residents of the State of Colorado, returnable twenty days from the issuing thereof.

HILLIARD S. RIDGELY,
Attorney for Plaintiff.

To CHARLES J. OHNHAUS, *Clerk.*
Cheyenne, Wyoming, Feb. 14th, 1913.

Filed in the District Court on Feb. 14, 1913.

[18] Subpoena in Chancery.

UNITED STATES OF AMERICA, *District of Wyoming, ss:*

In the District Court of the United States for the District of Wyoming, sitting at Cheyenne.

12 The President of the United States of America: To the Midwest Oil Company, the Reed Investment Company, the Fitzhugh Oil Company, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, greeting:

You and each of you are hereby commanded, that you appear before the judge of the District Court of the United States, for the District of Wyoming, at the city of Cheyenne, in said district, twenty days from the date hereof, to answer the bill of complaint of the United States of America, this day filed in the office of the clerk of said court, in said city of Cheyenne, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the marshal of the district of Wyoming to execute and make due return.

Witness, the Honorable John A. Riner, judge of the District Court of the United States, for the District of Wyoming, and the seal of the said district court, at the city of Cheyenne, aforesaid, this fourteenth day of February, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States, the 136th year.

[SEAL.]

CHARLES J. OHNHAUS,
Clerk.

[19] Memorandum.

The above-named defendants are hereby notified that unless they and each of them shall file their answer or other defense in the office of the clerk of said court, at the city of Cheyenne, aforesaid, on or before the twentieth day after service, excluding the day thereof the bill of complaint may be taken pro confesso.

CHARLES J. OHNHAUS,
Clerk.

UNITED STATES OF AMERICA, *District of Wyoming*, ss:

I certify that I served the attached subpoena on the within named the Midwest Oil Company by delivering a true copy thereof to John B. Barnes, jr., designated agent for service of said company, personally at Casper, county of Natrona, State and district of Wyoming, on the 15th day of February, 1913.

I served said subpoena on the within named, the Fitzhugh Oil Company by delivering a true copy thereof to John B. Barnes, jr., designated agent for service of said company, personally, at Casper, county of Natrona, State and district of Wyoming, on the 15th day of February, 1913.

The within-named The Reed Investment Company, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, could not be found within the district of Wyoming, and were not served.

Witness my hand at Cheyenne, Wyoming, this 19th day of February, 1913.

HUGH L. PATTON,
United States Marshal.

Fees.

Service, 2 @ \$4-----\$ 8.00

Mileage, 221 @ 12c----- 26.52

\$34.52

[20] Endorsed: Filed in the District Court on Feb. 19, 1913.

[21] (Affidavit of J. H. Favorite for the United States.)

STATE AND DISTRICT OF WYOMING, ss:

J. H. Favorite, being first duly sworn, deposes and says:

I am, and for more than two years last past have been, a special agent of the General Land Office of the United States, assigned to duty in the district or division which includes the State of Wyoming. During said time I have worked under the direction of A. Baker, the chief of said district or division. My duties as such special agent have related to field examinations on behalf of the Department of the Interior with reference to the administration of the public-land laws of the United States and the enforcement and protection of the proprietary and other rights of the United States in the public lands, including these growing out of trespasses and waste committed upon any of the public lands. Under the direction of said A. Baker, chief of said district or division, I personally investigated the transaction referred to in the bill [22] of complaint filed in the above-entitled cause, and in this manner acquired personal knowledge thereof. I swear that the statements made in the bill of complaint filed in the above-entitled cause are true of my own personal knowledge, except as to such statements as are made upon information and belief, all of which I verily believe to be true. My knowledge of these facts upon which the prayer in said bill for temporary relief

14 by injunction is based was obtained from a personal inspection of the records of the United States Land Office, the records of the county of Natrona, Wyoming, a personal inspection and obser~~action~~ of the land described in said bill of complaint, and operations conducted by the defendants upon said land, and from admissions and statements made to me by the defendants and their duly authorized officers and agents.

J. H. FAVORITE.

Subscribed and sworn to before me this 25th day of February, A. D. 1913.

[SEAL.]

CHARLES J. OHNHAUS,
*Clerk United States District Court
for the District of Wyoming.*

Filed in the District Court on Febry. 25, 1913.

[23] (Motion for service upon nonresident defendants.)

Now comes the plaintiff in the above-entitled cause and shows to the court that personal service upon the defendants, The Reed Investment Company, a corporation, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z Reed, can not be obtained in this district, they being absent therefrom, and further, that this suit involves title to land lying within this district.

Wherefore plaintiff prays the court for an order directing service of a certified copy of the bill of complaint and of said order to be made upon said nonresident defendants, The Reed Investment Company, a corporation, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, in the State of Colorado, plaintiff being creditably informed that they are all to be found in that State.

W. E. MULLEN,
Asst. United States Attorney.

[24] UNITED STATES OF AMERICA, *District of Wyoming, ss:*

W. E. Mullen, being first duly sworn, upon his oath deposes and says: That he is assistant United States attorney for the district of Wyoming, and as such makes the foregoing motion on behalf of the plaintiff in the foregoing-entitled case; that he knows the contents of said motion and that the statements therein made are true as he verily believ's.

W. E. MULLEN.

15 Subscribed in my presence and sworn to before me this 1st day of March, A. D. 1913.

[SEAL.]

CHARLES J. OHNHAUS, *Clerk.*

Filed in the District Court on March 1, 1913.

[25] (Order for service upon nonresident defendants.)

Now on this day, the above-entitled cause coming on to be heard, upon the motion of the plaintiff, asking for an order of service out of

this district upon the defendants, The Reed Investment Company, a corporation, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, and it being shown to the court that service cannot be made upon said defendants within this district, and further, it being made to appear that this action involves the question of title to lands lying within this district, and that service can be made upon the said defendants, The Reed Investment Company, a corporation, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, in the State of Colorado.

It is therefore considered and ordered that said defendants, The Reed Investment Company, a corporation, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, be and they are required to appear, plead by motion or answer to said bill of complaint on or before the 7th day of April, [26] 1913, and that service be made upon the said defendants, The Reed Investment Company, a corporation, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, in the State of Colorado, by delivering to each of said defendants a certified copy of the bill of complaint in the above-entitled case, and of this order.

Dated, Cheyenne, Wyoming, March 1st, 1913.

JOHN A. RINER, *Judge.*

Endorsements: No. 733. In Equity. In the District Court of the United States for the District of Wyoming. United States of America vs. The Midwest Oil Co. et al. Order. Filed March 11, 1913. Charles J. Ohnhaus, Clerk.

UNITED STATES OF AMERICA, *District of Colorado, ss.*

DENVER, COLORADO, *March 11, 1913.*

I hereby certify and return that I received the within writ on the 7th day of March, A. D. 1913, and that I have personally served the same as follows, to wit:

16 As to the Reed Investment Company, by delivering to J. L. Warren, personally, as the secretary and treasurer of the said The Reed Investment Company, a true copy of the within writ, together with a certified copy of the bill of complaint herein, at Denver, in said district, on the 7th day of March, A. D. 1913.

As to A. M. Johnson, J. L. Warren, and V. Z. Reed by delivering a true copy of the within writ, together with a certified copy of the bill of complaint herein, to each of them, personally, at Denver, in said district, on the 7th day of March, A. D. 1913.

As to O. H. Shoup, by delivering to him, personally, a true copy of the within writ, together with a certified copy of the bill of complaint herein, at Denver, in said district, on the 10th day of March, A. D. 1913.

D. C. BAILEY,
U. S. Marshal.

By E. B. CHADWICK,
Deputy.

Fees & costs.
\$10.00

[27] (Motion for an order extending time to file answer.)

Comes now K. C. Schuyler, esquire, and Walter F. Schuyler, esquire, attorneys for the above-named defendants, and moves the court for an order extending the time to defendants until the 27th day of March, A. D. 1913, to file their answer or other defense to the bill of complaint of the plaintiff in said *cuase*; and as reasons therefor state:

1. Service of the subpoena which was issued in the above-entitled cause has been served only upon the Midwest Oil Company, the other dependants being nonresidents of the State of Wyoming.

2. That it is desired that all of the defendants appear and answer at the same time.

3. That these attorneys have not been able to confer with the defendants not served with process.

K. C. SCHUYLER,

WALTER F. SCHUYLER,

*Attorneys for Defendants The Midwest Oil Company
and The Reed Investment Company.*

[28] Filed in the District Court on March 4, 1913.

17

[29] (Order extending time to file answer.)

This day came the above-named defendants, by their attorneys, K. C. Schuyler, esquire, and Walter F. Schuyler, esquire, and presented to the court their motion for an extension of time for defendants to file answer or other defense to the bill of complaint in the above-entitled cause; and the same having been duly considered by the court, and the court being duly advised in the premises; and the plaintiff, the United States of America, being represented by H. S. Ridgely, esquire, United States attorney for the district of Wyoming, and he not objecting thereto, the said motion is hereby allowed, and said defendants and each of them are given time until the 27th of March, A. D. 1913, within which to file answer or other defense to the bill of complaint filed herein.

Done this 4th day of March, A. D. 1913.

JOHN A. RINER, *Judge.*

[30] Filed in the District Court on March 4, 1913.

[31] The joint and several motion of all of the above-named defendants to dismiss the bill of complaint of the plaintiff.

To the honorable District Court of the United States within and for the district of Wyoming:

Defendants The Midwest Oil Company, The Reed Investment Company, The Fitzhugh Oil Company, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed, both jointly and severally, hereby

move that the bill of complaint in the above-entitled suit, and the whole thereof, be dismissed for insufficiency of fact to constitute a valid cause of action in equity against the said defendants, or either of them, in this:

First. It appears by the plaintiff's own showing by the said bill that it is not entitled to the relief prayed by the bill against the defendants or either or any of them.

Second. It appears by the plaintiff's own showing by [32] the said bill, and the law applicable thereto, that the so-called order of withdrawal alleged to have been made by the Secretary of the Interior on September 27, 1909, and entitled "Temporary petroleum withdrawal number 5" (and a copy of which order is attached to the bill) was made without authority of law, and, at the time it was made and promulgated, if it was in truth and in fact made
18 or promulgated as alleged in the bill, was and ever since has been wholly void and of no effect, and contrary to and in violation of the provisions of the Constitution and laws of the United States with respect of the control and disposition of the public lands of the United States, and particularly public lands containing deposits of petroleum or other minerals. By reason whereof, the plaintiff cannot have, and is not entitled to receive, any benefit or advantage from the said so-called withdrawal order of September 27th, 1909, its said bill and all relief prayed for thereby being conditioned and based exclusively upon the alleged validity and effect of said withdrawal order.

Third. It appears by the plaintiff's own showing by the said bill that the defendants or their grantors under whom they claim and have title and who are referred to in the bill as the "original claimants," entered upon the mineral land described therein, to wit, the northeast quarter of section eleven of township thirty-nine north of range seventy-nine west of the sixth principal meridian, on March 27, 1910, and commenced work for the purpose of exploration and for the discovery of petroleum thereon, and entered into the actual occupation of said land, then and there being a part of the public mineral domain of the United States open to occupation and exploration for the discovery of petroleum; and thereafter were continuously in the diligent prosecution of such work until [33] May 5th, 1910, on which date petroleum was encountered and discovered by them thereon in paying quantities.

It further appears from the plaintiff's bill that on the 2nd day of July, 1910, and at the time of the alleged making and promulgation of that certain order styled in the bill "Order of withdrawal, petroleum reserved, No. 8," the said land had been duly located and claimed, under the mineral-land laws of the United States, by the original claimants, and that said claimants were at said date in the actual occupation and possession thereof under such laws, and had theretofore made a valid and subsisting discovery of petroleum in said land. Therefore, under the laws of the United States, particularly those relating to the occupation, possession, and location of

mineral lands, such land was not, upon said 2nd day of July, 1910, subject to withdrawal under said order of July 2nd, 1910, nor were the vested rights of the original claimants, then subsisting therein, impaired or affected thereby. Further, by the express terms of the act of the Congress of the United States, approved June 25, 1910 (36 Stat. L., 847), set forth at large in the bill, and under whose exclusive authority said withdrawal order of July 2nd, 1910, was made or promulgated, if it was so made and promulgated, the said land was expressly removed and exempted from any such withdrawal.

19 It further appears from the bill that after July 2, 1910, but long prior to the commencement of this suit, the original claimants assigned, set over, and conveyed unto certain of the defendants all their right, claim, interest, and title to said land, initiated, acquired, and vested as aforesaid; and that the defendants, or some of them, are now, and were at the time of the commencement of this suit, entitled to and in the actual enjoyment of all of the rights and title of the original [34] claimants, and entitled to and in the occupation and possession of said lands, with the right to mine and extract the petroleum contained therein; and that all of the acts of the defendants, or either of them, complained of in the bill, have been done and are being done under and by virtue of the right, title, and interest acquired by their grantors, the original claimants, as aforesaid, prior to July 2, 1910.

JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
WALTER F. SCHUYLER,
KARL C. SCHUYLER,
LEE CHAMPION,

*Solicitors for defendants, The Midwest Oil Company, The
Reed Investment Company, The Fitzhugh Oil Company,
O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed.*

Filed in the district court on March 26, 1913.

[35] Order setting hearing on motion to dismiss.

Monday, April 7, 1913.

This cause coming on now to be heard on the motion to dismiss the bill of complaint herein, Hilliard S. Ridgely, Esquire, appearing as solicitor for the complainant, and Ralph Hartzell, Esquire, appearing as solicitor for the respondents, it is ordered by the court that the hearing on said motion to dismiss be, and the same is hereby, set for Thursday, May first, A. D. 1913, at ten o'clock in the forenoon.

[36] (Order, April 17, 1913, resetting hearing on motion to dismiss.)

This cause coming on now to be heard, upon the application of the parties hereto, for a continuance of hearing heretofore set for

20 Thursday, May first, A. D. 1913, it is now ordered by the court that the order heretofore entered setting this case for hearing on Thursday, May first, 1913, be, and the same is hereby, set aside, and the hearing is now set for Wednesday, May seventh, A. D. 1913, at ten o'clock in the forenoon.

[37] (Motion to dismiss argued and continued.)

This cause coming on now to be heard on the motion to dismiss the bill of complaint, Ernest Knaebel, Esq., Assistant Attorney General of the United States, H. S. Ridgely, Esquire, United States attorney for the district of Wyoming, and William E. Mullen, Esquire, assistant United States attorney for the district of Wyoming, appearing as solicitors for the complainant, and Joel F. Vaile, Esquire, Henry McAllister, jr., and Karl C. Schuyler, Esquire, appearing as solicitors for the respondents, is argued by counsel to the hour of adjournment.

It is ordered by the court further hearing of this case be, and the same is hereby, continued to Thursday, May 8th, 1913, at ten o'clock in the forenoon.

JOHN A. RINER, *Judge.*

Filed in the district court on May 7, 1913.

[38] (Motion to dismiss argued and taken under advisement.)

This cause coming on now to be heard on the motion to dismiss the bill of complaint, Ernest Knaebel, Esquire, Assistant Attorney General of the United States, H. S. Ridgely, Esquire, United States attorney for the district of Wyoming, and William E. Mullen, Esquire, assistant United States attorney for the district of Wyoming, appearing as solicitors for the complainant, and Joel F. Vaile, Esquire, Henry McAllister, jr., and Karl C. Schuyler, Esquire, appearing as solicitors for the respondents, is argued by counsel and by the court taken under advisement.

It is ordered by the court that the complainant have twenty days from and after this date within which to file its brief, and the respondents five days thereafter within which to file their briefs.

JOHN A. RINER, *Judge.*

[39] Filed in the district court on May 18, 1913.

21 [40] (Certified copy of telegram, Ballinger to Acting Secretary Pierce, Interior Department, Sept. 26, 1909.)

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 19, 1913.

I, Franklin K. Lane, Secretary of the Interior, hereby certify that the annexed paper is a true and correct copy of the original as it appears on file in this department.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

FRANKLIN K. LANE,
Secretary of the Interior.

[41] Form 168.

File Finney.

The Western Union Telegraph Company,
Incorporated.

Pierce.

24,000 offices in America.

Cable service to all the world.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeatd messages, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

This is an unrepeatd message and is delivered by request of the sender, under the conditions named above.

ROBERT C. CLOWRY,
President and General Manager.

Received at Wyatt Building, cor. 14th & F Streets, Washington, D. C.

Telephones: M 4106, M 2114, and M 1707.

22 54 CH. IS. 42 Collect Govt.

Dept. of the Interior
Received

K. Salt-Lake, Utah, Sept. 26th, 1909.

Sept. 27, 1909

Secy's Office

Division of Mails and
Files.

Acting Secretary. Pierce, Interior. Dept ----- Washington,
D. C.

Have conferred with President respecting temporary withdrawals covering oil lands if present withdrawals permit mining entries being made of such lands wish the withdrawals modified at once to prohibit such disposition pending legislation.

BALLINGER.

148 P. M.

Always open. Money transferred by telegraph. Cable office.
Endorsed: Filed in the district court on June 9, 1913.

[42] (Certified copy of telegram, Frank Pierce. Acting Secretary, to Secretary of Interior Sept. 27, 1909.)

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 19, 1913.

I, Franklin K. Lane, Secretary of the Interior, hereby certify that the annexed paper is a true and correct copy of the original as it appears on file in this department.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

FRANKLIN K. LANE,
Secretary of the Interior.

23

[43] 1-080 b. Charge G. R.

(Telegram)

DEPARTMENT OF THE INTERIOR,
September 27, 1909.

Hon. R. A. BALLINGER,
Secretary of the Interior,
Care President's Special, Helena, Montana:

Telegram twenty-sixth received. California and Wyoming petroleum withdrawals heretofore made permit mining locations. Following your direction I have temporarily withdrawn from all forms of location and entry two million eight hundred seventy-one thousand acres in California and one hundred and seventy thousand acres in Wyoming, all heretofore withdrawn for classification. My withdrawal prevents all forms of acquisition in future and holds the land in statu quo pending legislation.

FRANK PIERCE,
Acting Secretary.
Ecf Ep.

Filed in the District Court on June 9, 1913.

[44] (Certified copy of communication, H. C. Rizer, acting director, to the Secretary of the Interior, Sept. 27, 1909.)

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 19, 1913.

I, Franklin K. Lane, Secretary of the Interior, hereby certify that the annexed paper is a true and correct excerpt copy of so much of the original as appears on file in this department as relates to the withdrawal of land in township 39 north, or range 79 west, of the 6th principal meridian in the State of Wyoming.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

FRANKLIN K. LANE,
Secretary of the Interior.

[45] SEPTEMBER 25, 1909.

24

The honorable, the SECRETARY OF THE INTERIOR.

SIR: In accordance with your orders I have the honor to submit the following recommendation, which covers approximately 3,041,000 acres, of which the larger part is probably private land and not affected by this withdrawal.

Temporary petroleum withdrawal No. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner, after field investigation and examination.

Wyoming
(Sixth principal meridian)
T. 39 N. R. 79 W.

Very respectfully,

(Sig)

H. C. RIZER,
Acting Director.

Approved September 27, 1909, and sent to General Land Office.

FRANK PIERCE,
Acting Secretary.
ECF.

[46] Filed in the District Court on June 9, 1913.

[47] (Decree.)

In the District Court of the United States for the District of
Wyoming.

The United States of America, plaintiff.
No. 733. vs. In Equity.
The Midwest Oil Company, et al., defendants.

This cause came on to be heard at this term on the bill of complaint and the motion to dismiss the same and was argued by counsel; and thereupon upon consideration thereof it is ordered, adjudged, and decreed by the court that the said motion to

- 25 dismiss be, and the same is hereby, sustained, and the bill of complaint dismissed, to which order and decree of the court the plaintiff, by counsel, then and there excepted.

JOHN A. RINER,

Judge.

Filed in the District Court on June 14, 1913.

[48] (Petition on appeal.)

The above named complainant, considering itself aggrieved by the final decision of this cause made and entered on the fourteenth day of June, A. D. 1913, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit from said decree, and it prays that this, its appeal, may be allowed, and that a transcript, duly authenticated, of the record of proceedings in the above entitled case upon which said decree was made, together with the accompanying assignment of errors, may be transmitted with this bill to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated Cheyenne, Wyoming, June 21, A. D. 1913.

HILLIARD S. RIDGELY,

United States Attorney for the District of Wyoming.

WILLIAM E. MULLEN,

*Assistant United States Attorney for the District of Wyoming,
Solicitors for Complainant, United States of America.*

[49] Filed in the District Court on June 21, 1913.

[50] (Order allowing appeal.)

This cause coming on to be heard upon the assignment of error and petition on appeal heretofore within the proper time filed herein by the complainant, United States of America, the petition for appeal aforesaid is allowed and such appeal granted.

Dated June 20, A. D. 1913.

JOHN A. RINER, *Judge.*

Filed in the District Court on June 21, 1913.

The complainant, United States of America, by Hilliard S. Ridgely, United States attorney for the district of Wyoming, and William E. Mullen, assistant United States attorney for the district of Wyoming, acting in pursuance of the express instructions of the Attorney General in that behalf given, files the following assignment of error upon which it will rely upon its appeal from the final decree made herein by this honorable court on the fourteenth day of June, A. D. 1913, saying that in the record and proceedings herein and in said final decree there is manifest error, and for error the complainant assigns on the appeal the following:

I.

The court erred in rendering the decree sustaining the motion to dismiss and dismissing the bill of complaint.

In order that the foregoing assignment of error may [52] be and appear of record, the complainant presents the same to the court and prays that such disposition be made thereof as is in accordance to law and the statutes of the United States in such cases made and provided. All of which is respectfully submitted.

HILLIARD S. RIDGELY,
United States Attorney for the District of Wyoming.

WILLIAM E. MULLEN,
Assistant United States Attorney for the District of Wyoming.
Solicitors for Complainant, United States of America.

Filed in the District Court on June 21, 1913.

[53] (Citation.)

United States of America to The Midwest Oil Company, The Reed Investment Company, The Fitzhugh Oil Company, O. H. Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, sitting at Cheyenne, wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the United States of America, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

[54] Witness the honorable John A. Riner, judge of the District Court of the United States for the District of Wyoming, this 21st day of June, A. D. 1913.

[Seal U. S. District Court,
District of Wyoming.]

JOHN A. RINER, *Judge.*

Due service accepted this 21st day of June, A. D. 1913.

JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
W. F. SCHUYLER,
K. C. SCHUYLER,
Solicitors for Defendants.

Filed in the District Court on June 21, 1913.

[55] (Praeipe for transcript.)

The clerk will prepare a transcript in the above-entitled cause, consisting of the following papers, orders, and files, to be transmitted to the Circuit Court of Appeals:

Bill of complaint,

Praeipe for subpoena in chancery for two certain defendants,

Praeipe for subpoena in chancery for five certain defendants.

Subpoena in chancery,

Affidavit of J. H. Favorite for U. S.,

Motion for service out of district,

Order for service out of district,

Motion for extension of time to answer,

Order extending time to answer,

Motion to dismiss bill,

Order setting hearing on motion to dismiss,

Order resetting hearing on motion to dismiss,

28 Motion to dismiss argued and taken under advisement,

3 certified copies of telegrams from Secretary of Interior,

Judge's memorandum,

Decree sustaining motion to dismiss,

[56] Petition on appeal,

Order allowing appeal,

Assignment of error,

Citation,

Praeipe for transcript.

HILLIARD S. RIDGELY,

United States Attorney for the District of Wyoming.

WILLIAM E. MULLEN,

Assistant United States Attorney for the District of Wyoming.

Solicitors for Complainant, United States of America.

To CHARLES J. OHNHAUS, *Clerk,*

Cheyenne, Wyoming, June 21, 1913.

Filed in the District Court on June 21, 1913.

[57] (Clerk's certificate to transcript.)

UNITED STATES OF AMERICA, *District of Wyoming, ss:*

I, Charles J. Ohnhaus, clerk of the District Court of the United States for the District of Wyoming, do hereby certify the above and foregoing pages (1) to (----), both inclusive, to be a true, correct, and complete transcript and copy of the record and proceedings, and of all thereof, as directed by praecipe for transcript, in a certain cause lately in said court pending, wherein United States of America is complainant, and The Midwest Oil Company, The Reed Investment Company, The Fitzhugh Oil Company, O. H.

29 Shoup, A. M. Johnson, J. L. Warren, and V. Z. Reed are respondents, as full and complete as the same still remains on file and of record in my office at Cheyenne.

In testimony to the above, I do hereto sign my name and affix the seal of said court, at Cheyenne, in said district, this 21st day of June, A. D. 1913.

[Seal U. S. District Court, District of Wyoming.]

CHARLES J. OHNHAUS,

Clerk of U. S. District Court, District of Wyoming.

Filed Jun. 28, 1913. John D. Jordan, Clerk.

[58] (Memorandum opinion of district court.)

Judge's memorandum.

The bill of complaint in this case seeks to have declared void the claim of title asserted by the defendants to certain oil lands located in Natrona County, Wyoming, and described in the bill as the north-east quarter of section eleven, township nine north of range seventy west. The defendants have filed a motion to dismiss. The facts as disclosed by the bill may be briefly stated as follows: On the 27th of September, 1909, the Secretary of the Interior issued what is designated in the record as temporary petroleum withdrawal No. 5, which is in the following words: "In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws, all locations or claims existing and valid at this date may proceed to entry in the usual manner after field investigation and examination." Then follows a description of the lands in the States of California and Wyoming, which include the 160 acres involved in this suit. It is further stated in the bill that subsequent to the issuance of this withdrawal order, and on the 27th of March, 1910, the grantors of the defendants entered upon the land in controversy and sunk a well to a great depth and had therein encountered and thereby rendered subject to ready extraction large deposits of petroleum of great commercial value within the above described parcel of land. The bill shows that no work had been done by the grantors of the defendants, the original claimants, prior to the 27th of March, 1910, nor was there any discovery until after the latter date. The bill then states that on May 4, 1910, the original claimants caused to be filed for record and to be recorded in the records of Natrona County a location certificate bearing date March 10, 1910, evidencing a claim or location by them of the lands described in the bill as a petroleum placer mining claim, under and in pursuance of the mining laws of the United States. It then sets

forth that the property was transferred to the defendants and that the rights of the defendants are based solely upon a transfer and assignment of the rights in said lands acquired by the previous location and by the drilling of said well; that the location was violative of the order of withdrawal and of the act of Congress approved June 25, 1910. The bill then states that the defendant had extracted more than 50,000 barrels of oil of the value of \$1.00 per barrel; that a demand was made upon the defendants on December 19, 1911, to vacate the lands and surrender possession, which they refused to do; that the present value of the lands exceeds \$250,000.00. The bill closes with a prayer that the defendants be decreed to have no estate, right, title, or interest in or to the land or to the minerals therein and that the lands and minerals be adjudged to be the property of the plaintiff. It also prays for an injunction and accounting.

The sole question presented by the motion to dismiss is whether the Secretary of the Interior, even by the direction of the President, had the power, implied or otherwise, to withdraw these lands from entry in the absence of congressional legislation authorizing him to do so.

[60] Prior to the 25th of June, 1910, there was no statute expressly authorizing the Secretary of the Interior or the President to make withdrawals of public land of the class herein described and for the purposes named in the order of withdrawal from settlement, location, sale, or entry under the public land or mining laws of the United States. This being true, the question is narrowed to this: Did the Secretary of the Interior or the President, under the expressed or implied powers conferred upon them to administer the land laws and to make all needed rules and regulations with reference thereto, have the power to make the withdrawal order of September 27, 1909?

While the question resolves itself into a narrow one, it opened a broad field for discussion and was ably argued by counsel on both sides. It would be interesting indeed to notice at some length the propositions discussed by counsel in support of and against the existence of the power to promulgate this order and to review the authorities to which the court's attention was directed; but as the case will doubtless go to an appellate court (and the court indulges in the hope that it will) that seems unnecessary. It is quite sufficient

for the court here to say that it has devoted itself to a careful and painstaking examination of every authority called to its attention by counsel, both at the oral argument and in the briefs, and that such examination and consideration has led to the conclusion that the power did not exist in the absence of congressional legislation authorizing it.

A decree will be entered sustaining the motion and dismissing the bill, with an exception allowed to the plaintiff.

Endorsed: Filed in the district court on June 14, 1913.

Filed Jun. 28, 1913. John D. Jordan, Clerk.

- 32 (Appearance of Messrs. Hilliard S. Ridgely and W. E. Mullen
as counsel for the appellant.)

United States Circuit Court of Appeals,

Eighth Circuit.

No. 3996.

United States of America, appellant,

vs.

The Midwest Oil Company, The Reed Investment Company, The
Fitzhugh Oil Company, O. H. Shoup, A. M. Johnson, J. L. War-
ren, and V. Z. Reed.

The clerk will enter my appearance as counsel for the appellant.

HILLIARD S. RIDGELY,
U. S. Atty., Cheyenne, Wyo.

W. E. MULLEN,
Asst. U. S. Atty.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Jul. 2, 1913.

(Appearance of Mr. Ernest Knaebel as counsel for the appellant.)

The clerk will enter my appearance as counsel for the appellant.

ERNEST KNAEBEL,
Assistant Attorney General.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 9, 1913.

- 33 (Appearance of Messrs. Vaile, McAllister & Vaile as counsel
for the appellees.)

The clerk will enter my appearance as counsel for the appellees.

JOEL F. VAILE.
HENRY McALLISTER, Jr.
WILLIAM N. VAILE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 9, 1913.

(Appearance of Messrs. Schuyler & Schuyler as counsel for the
appellees.)

The clerk will enter my appearance as counsel for the appellees.

KARL C. SCHUYLER,
WALTER F. SCHUYLER,
*1237 First National Bank Bldg.,
Denver, Colo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 11,
1913.

(Order of submission.)

SEPTEMBER TERM, 1913,
Tuesday, September 30, 1913.

In the above cause the court after an inspection of the record and briefs announced that, owing to the importance and great public interest involved, certain questions would be certified to the Supreme Court of the United States for the opinion of that court; this cause was thereupon taken by the court as submitted, without oral argument, upon the transcript of record from said district court, and the briefs of counsel filed herein.

34 (Order to file and record certificate of questions to Supreme Court of the United States.)

United States Circuit Court of Appeals, Eighth Circuit. September term, 1913.

WEDNESDAY, *October 8, 1913.*

United States of America, appellant,
vs.
The Midwest Oil Company et al. } No. 3996.

Appeal from the District Court of the United States for the District of Wyoming.

In the above entitled cause certain questions having arisen on the record upon which this court desires the instruction of the Supreme Court of the United States as provided by law, and a certificate of such questions having been prepared and duly signed, it is now here ordered by this court that such certificate be filed and entered of record in this court and that the original of said certificate be duly certified by the clerk of this court, and that it be by him duly transmitted to the Supreme Court of the United States for its action thereon.

Said certificate being in words and figures as follows, viz:

(Memorandum of clerk: In accordance with the above order, the original certificate of questions was filed and recorded and transmitted to the Supreme Court of the United States, and for that reason a copy of same is not again included in this transcript.)

35 (Clerk's certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Wyoming as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true.

and complete copies of all the pleadings, record entries, and proceedings, except the certificate of the questions of said Circuit Court of Appeals to the Supreme Court of the United States and the full captions, titles, and endorsements, which captions, titles, and endorsements are omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said court wherein United States of America is appellant and The Midwest Oil Company et al. are appellees, No. 3996, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the city of St. Louis, Missouri, this thirtieth day of October, A. D. 1913.

[SEAL.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

36

Supreme Court of the United States.

No. 750, October term, 1913.

The United States

vs.

The Midwest Oil Company et al.

On consideration of the motion that the whole record and this cause may be sent up to this court for its consideration,

It is now here ordered by the court that said motion be, and the same is hereby, granted, and that the transcript of record presented with the motion be taken as a return to this order.

NOVEMBER 10, 1913.

(Indorsed :) File No. 23901. Supreme Court of the United States. October term, 1913. Term No. 750. Order granting motion to bring up whole record, etc. Filed November 10, 1913.

○

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 750.

THE UNITED STATES

vs.

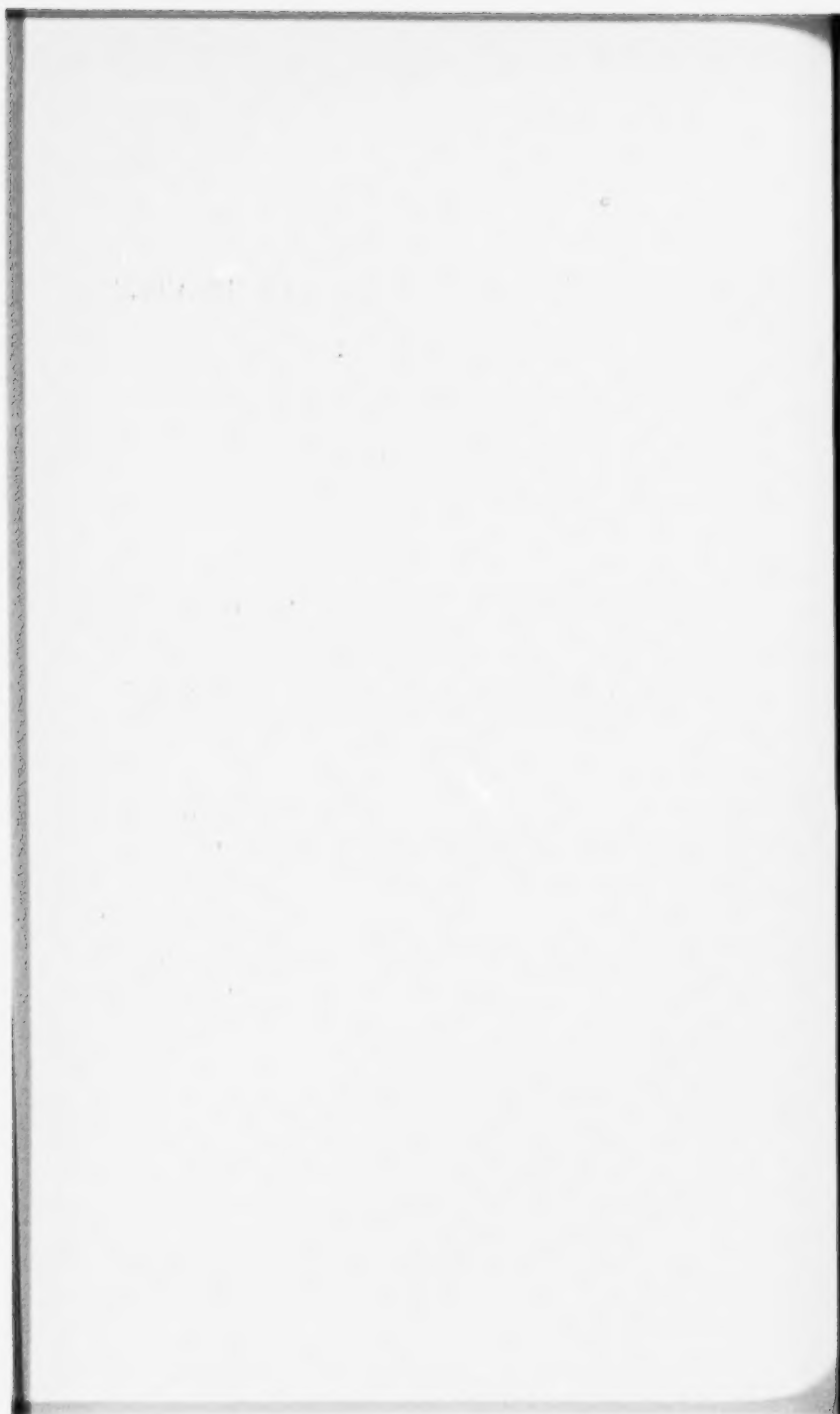
THE MIDWEST OIL COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original. Print.	
Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.....	1	1
Statement of facts.....	1	1
Questions certified.....	8	5
Judges' certificate.....	9	6
Clerk's certificate.....	10	6

13619—13



1 In the United States Circuit Court of Appeals for the Eighth Circuit.

THE UNITED STATES

vs.

THE MIDWEST OIL COMPANY, ET AL., APPELLEES.

} No. 3996.

The United States Circuit Court of Appeals for the Eighth Circuit certifies that the record in the above-entitled cause, now pending in said court upon an appeal from the District Court of the United States for the District of Wyoming, discloses the following:

On September 27, 1909, the Acting Secretary of the Interior, by direction of the President, approved a written recommendation and order, which (omitting description of lands not the subject of this proceeding) is as follows:

"SEPTEMBER 27, 1909.

"The honorable the SECRETARY OF THE INTERIOR.

"SIR: In accordance with your orders I have the honor to submit the following recommendation, which covers approximately 3,041,000 acres, of which the larger part is probably private land and not affected by this withdrawal:

"TEMPORARY PETROLEUM WITHDRAWAL NO. 5.

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

"(Here follow descriptions of lands, including the following:)

"WYOMING.

"(Sixth principal meridian.)

2 "T. 39 N., R. 79 W.

"Very respectfully,

"H. C. RIZER, *Acting Director.*"

"Approved September 27, 1909, and sent to General Land Office.

"FRANK PIERCE, *Acting Secretary.*

"E. S. F."

Temporary Petroleum Withdrawal No. 5, in the form set forth in the foregoing communication, was thereupon immediately promulgated.

In March 27, 1910, the grantors of the defendants (appellees), designated in the bill as "original claimants," entered upon a certain 160 acres of land included within the withdrawal above mentioned, to wit, the NE. $\frac{1}{4}$ of section 11, in T. 39 N., R. 79 W., of the sixth principal meridian, in the State of Wyoming, and commenced to drill a well for the purpose of exploring the said land and premises for petroleum, and thereafter said drilling operations were continued by the said original claimants until they had caused the said well to be sunk to a great depth and had, on May 5, 1910, therein encountered and rendered subject to ready extraction large deposits of petroleum of great commercial value within the said described parcel of land.

On May 4, 1910, the said original claimants caused to be filed for record and recorded in the records of the county of Natrona, State of Wyoming, a certain writing, purporting to be signed in their respective names, and purporting to be a location certificate evidencing a claim and location by them of the said described land as a petroleum placer mining claim under and in pursuance of the mining laws of the United States. At some time subsequent to July 2, 1910, the said original claimants assigned and transferred all such right, title, or interest as they or any of them ever had or claimed in or to the said described land to certain of the defendants, now appellees.

3 Under date of June 25, 1910, there was approved by the President an act of Congress, entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases." (36 Stat. L., 847, 848.)

On July 2, 1910, the President approved a written recommendation and order, which (omitting description of lands not the subject of this proceeding) is as follows:

"The honorable the SECRETARY OF THE INTERIOR.

"SIR: In accordance with your instructions I recommend the withdrawal for classification and in aid of legislation affecting the use and disposition of petroleum deposits belonging to the United States of the following areas in the State of Wyoming, involving approximately 255,461 acres:

"ORDER OF WITHDRAWAL.

"Petroleum Reserve No. 8.

"It is hereby ordered that those certain orders of withdrawal made heretofore—

"On Sept. 27, 1909, and described as Temporary Petroleum Withdrawal No. 5;

"On Oct. 12, 1909, and described as Temporary Petroleum Withdrawal No. 6;

"On Oct. 12, 1909, and described as Temporary Petroleum Withdrawal No. 7;

" On Oct. 30, 1909, and described as Temporary Petroleum Withdrawal No. 8;

" On Feb. 12, 1910, and described as Temporary Petroleum Withdrawal No. 13;

" On Oct. 8, 1910, and described as Temporary Petroleum Withdrawal No. 14;

" On June 18, 1910, and described as Temporary Petroleum Withdrawal No. 17;

4 " in so far as the same include any of the lands hereinafter described, be, and the same are hereby, ratified, confirmed, and continued in full force and effect; and subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled 'An act to authorize the President of the United States to make withdrawals of public lands in certain cases,' approved June 25, 1910, there is hereby withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, all of those certain lands of the United States set forth and particularly described as follows, to wit:

"(Here follow descriptions, including the following:)

"(Sixth principal meridian, Wyoming.)

" T. 39 N., R. 79. W., secs. 11, 12, and 13.

" Very respectfully,

" GEORGE OTIS SMITH, *Director*.

" July 1, 1910.

" Respectfully referred to the President, with recommendation that same be approved.

" R. A. BALLINGER, *Secretary*.

" Approved July 2, 1910, and referred to the Secretary of the Interior.

" WM. H. TAFT, *President*.

" Referred to the Commissioner of the General Land Office for appropriate action.

" FRANK PIERCE, *Acting Secretary*.

" D. M. C."

5 The foregoing facts appear by the bill, which also avers that by the order of September 27, 1909, *supra*, the described tract of land, "in common with many other tracts of the public lands of the United States, was withdrawn from mineral exploration and from any form whatsoever of location, settlement, selection, filing, entry, occupation, possession, purchase, or acquisition under the public-land laws or any thereof"; and that the said order of September 27, 1909, "has never been retracted or set aside; but, on the contrary, the same now is, and at all times since the aforesaid date thereof has continuously remained, in full force and effect."

It appears by the bill expressly that the described tract was unoccupied and unclaimed on September 27, 1909, when the first of the said orders of withdrawal was made, and remained so until entered upon by the original claimants March 27, 1910.

The bill alleges that the defendants have extracted and threaten to continue the extraction of oil from the described tract of land, and seeks a perpetual injunction and an accounting upon the theory that the location, being in the face of the withdrawal order of September 27, 1909, was void, and that the defendants are therefore trespassers. The bill did not allege the purposes of the order of withdrawal, beyond setting out the order itself in totidem verbis, except as to descriptions of lands not the subject of this proceeding. It was filed February 14, 1913.

The defendants made no request for an order requiring the plaintiff to give a further and better statement of the nature of its claim, or further and better particulars of any of the matters stated in the bill, but on March 26, 1913, filed their joint and several motion to dismiss the bill upon the grounds following, and those only, to wit:

"First. It appears by the plaintiff's own showing by the said bill that it is not entitled to the relief prayed by the bill against the defendants, or either or any of them.

"Second. It appears by the plaintiff's own showing by the said bill and the law applicable thereto that the so-called order of withdrawal alleged to have been made by the Secretary of the Interior on September 27, 1909, and entitled 'Temporary Petroleum Withdrawal Number 5' (and a copy of which order is attached to the bill), was made without authority of law, and at the time it was made and promulgated, if it was in truth and in fact made or promulgated as alleged in the bill, was and ever since has been wholly void and of no effect and contrary to and in violation

6 of the provisions of the Constitution and laws of the United States with respect of the control and disposition of the public lands of the United States, and particularly public lands containing deposits of petroleum or other minerals. By reason whereof the plaintiff cannot have, and is not entitled to receive, any benefit or advantage from the said so-called withdrawal order of September 27th, 1909, its said bill and all relief prayed for thereby being conditioned and based exclusively upon the alleged validity and effect of said withdrawal order.

"Third. It appears by the plaintiff's own showing by the said bill that the defendants, or their grantors under whom they claim and have title and who are referred to in the bill as the 'original claimants,' entered upon the mineral land described therein, to wit, the northeast quarter of section eleven of township thirty-nine north, of range seventy-nine west of the sixth principal meridian, on March 27, 1910, and commenced work for the purpose of exploration and for the discovery of petroleum thereon, and entered into the actual occupation of said land, then and there being a part of the public

mineral domain of the United States, open to occupation and exploration for the discovery of petroleum, and thereafter were continuously in the diligent prosecution of such work until May 5th, 1910, on which date petroleum was encountered and discovered by them thereon in paying quantities.

"It further appears from the plaintiff's bill that on the 2nd day of July, 1910, and at the time of the alleged making and promulgation of that certain order styled in the bill 'Order of Withdrawal, Petroleum Reserved, No. 8,' the said land had been duly located and claimed under the mineral-land laws of the United States by the original claimants, and that said claimants were at said date in the actual occupation and possession thereof under such laws and had theretofore made a valid and subsisting discovery of petroleum in said land. Therefore, under the laws of the United States, particularly those relating to the occupation, possession, and location of mineral lands, such land was not, upon said 2nd day of July, 1910, subject to withdrawal under said order of July 2nd, 1910, nor were the vested rights of the original claimants, then subsisting therein, impaired or affected thereby. Further, by the express terms of the act of the Congress of the United States, approved June 25, 1910 (36 Stat. L., 847), set forth at large in the bill, and under whose exclusive authority said withdrawal order of July 2nd, 1910, was made or promulgated, if it was so made and promulgated, the said land was expressly removed and exempted from any such withdrawal.

"It further appears from the bill that after July 2, 1910, but long prior to the commencement of this suit, the original claimants assigned, set over, and conveyed unto certain of the defendants all their right, claim, interest, and title to said land, initiated, acquired, and vested as aforesaid; and that the defendants, or some of them, are now, and were at the time of the commencement of this suit, entitled to and in the actual enjoyment of all of the rights and title of the original claimants, and entitled to and in the occupation and possession of said lands, with the right to mine and extract the petroleum contained therein; and that all of the acts of the defendants, or either of them, complained of in the bill have been done and are being done under and by virtue of the right, title, and interest acquired by their grantors, the original claimants, as aforesaid, prior to July 2, 1910."

Thereafter the defendants' motion was sustained and the bill dismissed by the District Court.

8 And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law arise upon the record in the case and that their decision is necessary to its proper disposition, and to the end that the cause rightly may be disposed of such court desires the instructions of the Supreme Court of the United States upon those questions, to wit:

1. Prior to the act of June 25, 1910 (36 Stat. L., 847, 848), did the President (or the Secretary of the Interior) have the lawful power, "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain," to withdraw public lands containing petroleum and chiefly valuable therefor from all forms of location, selection, filing, entry, or disposal under the public mineral-land laws?

2. Did Petroleum Withdrawal No. 5, of date September 27, 1909, have the effect of preventing the lawful location or acquisition of lands (described in said Withdrawal Order No. 5), which contained petroleum or other mineral oils, and were chiefly valuable therefor, by persons authorized to enter lands under the mining laws of the United States, under the provisions of the act of Congress entitled "An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States," approved February 11, 1897 (29 Stat L., 526)?

3. Must the efficacy of the order of September 27, 1909, to reserve the land in controversy from the subsequent initiation and acquisition of rights under the act of February 11, 1897, *supra*, be held to depend upon the nature of the purpose or purposes for which it was made?

4. If question No. 3 be answered in the affirmative, then was it essential to the validity of the reservation or withdrawal that the purpose or purposes to be expressed in the order itself?

5. If there were specific purposes actuating the order of September 27, 1909, sufficient in law to sustain it and consistent with, but not appearing in its language, was it incumbent on the plaintiff to allege such specific purposes in its bill in order to have the advantage of them as against the defendants' motion to dismiss?

9 6. Assuming that the general purposes expressed in the order of September 27, 1909, do not suffice alone to determine its validity or invalidity and that there might have been another consistent purpose sufficient to sustain it, should the order be presumed to be valid in the absence of any allegation or proof that such other purpose did not exist?

WILLIAM C. HOOK,

JOHN E. CARLAND,

ARBA S. VAN VALKENBURGH,

Judges of the Circuit Court of Appeals for the Eighth Circuit.

10 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of The United States of America, appellant, vs. The Midwest Oil Company et al., appellees, No. 3996, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of Denver, Colorado, in the Eighth Circuit, this 8th day of October, A. D. 1913.

[SEAL.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

11 (Indorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. September term, 1913. No. 3996. The United States of America, appellant, vs. The Midwest Oil Company et al. Certificate of questions to the Supreme Court of the United States. Filed October 8, 1913. John D. Jordan, clerk.

(Indorsement on cover:) File No. 23901. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 750. The United States vs. The Midwest Oil Company et al. (Certificate.) Filed October 14th, 1913. File No. 23901.



In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES	} No. 750.
<i>v.</i>	
THE MIDWEST OIL COMPANY, ET AL.	

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE AND FOR CERTIFICATION OF THE WHOLE RECORD.

The Solicitor General on behalf of the United States respectfully moves that this cause be advanced for early hearing because of its great public importance, and also prays that the court require the whole record and cause to be sent up for its consideration and final determination pursuant to section 239 of the Judicial Code.

THE QUESTION INVOLVED.

The case turns upon the question whether the President, prior to the approval of the Act of June 25, 1910 (36 Stat., 847), which *expressly* gave him the power, was impliedly authorized to reserve designated portions of the public domain chiefly valuable for petroleum against subsequent occupation and location under the general mining act of February 11, 1897 (29 Stat., 526).

BRIEF STATEMENT OF THE RECORD.

On September 27, 1909, pursuant to the direction of the President, an order was promulgated by the Interior Department, for the purpose of reserving certain unoccupied and unclaimed public petroleum lands in Wyoming and California, viz:

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination. [Here follow the descriptions of lands in Wyoming and California.]

This suit was brought for the purpose of restraining trespasses by the defendants upon a tract of land in Wyoming which was included in the above order of withdrawal. The bill alleges the making of the order and, by apt reference to an attached copy of it, sets forth its text as a part of the pleading. It alleges that in virtue of the order the land in controversy was withdrawn from occupation, location, and acquisition under the mining laws and remains in the ownership of the United States. It does not allege the purposes for which the order was made except as they appear by the quotation of the order itself.

The bill shows that *after* the order of withdrawal was made, but before June 25, 1910, the predecessors

in interest of the defendants entered upon the land in controversy, discovered oil, and undertook to locate it as an oil placer mining claim under the Act of February 11, 1897, *supra*.

The District Court sustained a motion to dismiss the bill upon the ground that the President was without authority to reserve the land against subsequent occupation and location under that law. Upon appeal the Circuit Court of Appeals has certified to this court the following questions, viz:

1. Prior to the Act of June 25, 1910 (36 Stat. L., 847, 848), did the President (or the Secretary of the Interior) have the lawful power, "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain," to withdraw public lands containing petroleum and chiefly valuable therefor from all forms of location, selection, filing, entry, or disposal under the public mineral land laws?

2. Did Petroleum Withdrawal No. 5, of date September 27, 1909, have the effect of preventing the lawful location or acquisition of lands (described in said Withdrawal Order No. 5), which contained petroleum or other mineral oils, and were chiefly valuable therefor, by persons authorized to enter lands under the mining laws of the United States, under the provisions of the act of Congress entitled "An Act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States," approved February 11, 1897 (29 Stat. L., 526)?

3. Must the efficacy of the order of September 27, 1909, to reserve the land in controversy from the subsequent initiation and acquisition of rights under the Act of February 11, 1897, *supra*, be held to depend upon the nature of the purpose or purposes for which it was made?

4. If question No. 3 be answered in the affirmative, then was it essential to the validity of the reservation or withdrawal that the purpose or purposes be expressed in the order itself?

5. If there were specific purposes actuating the order of September 27, 1909, sufficient in law to sustain it and consistent with but not appearing in its language, was it incumbent on the plaintiff to allege such specific purposes in its bill in order to have the advantage of them as against the defendants' motion to dismiss?

6. Assuming that the general purposes expressed in the order of September 27, 1909 do not suffice alone to determine its validity or invalidity, and that there might have been another consistent purpose sufficient to sustain it, should the order be presumed to be valid in the absence of any allegation or proof that such other purpose did not exist?

REASONS FOR ADVANCING THE CAUSE.

The order of September 27, 1909, and a number of others like it made before the approval of the Act of June 25, 1910, operated, if valid, to reserve all the public lands in described townships and sections aggregating 4,546,988 acres. (Report of Secretary of the Interior for the fiscal year 1910, p. 93). The

lands withdrawn lie in Wyoming, California, and six other States. A considerable part of the California land is subject to the claims of the Southern Pacific Railroad Co. under patents containing reservations of mineral land to the United States, like the patent involved in the case of *Burke v. Southern Pacific*, No. 279, October Term, 1913, which is now under consideration by this court after argument and submission. Other parts of the lands were already subject to unquestionable private titles and claims before the orders were made and hence were not affected thereby. But, after deducting such last-mentioned areas, there remain not only the lands subject to the Southern Pacific claim, but also an immense area of lands which at the dates of these orders were unoccupied and unclaimed public lands of the United States. Of these last a large percentage have been occupied and claimed by individuals and corporations as oil placer mining claims since the withdrawals were made but before the approval of the Act of June 25, 1910, and before the President was afforded opportunity to act again under the express sanction of that statute. In the State of California the lands subject to such claims, as well as certain of the lands affected by the Southern Pacific claim, have become the theater of extensive drilling and pumping operations whereby vast quantities of oil have been extracted and sold and are being extracted and sold from day to day. The value of the subject matter thus brought in dispute between the Government and private claimants is believed to mount

into hundreds of millions of dollars. Several suits have been begun by the Government and many more are in immediate contemplation, in California, for the purpose of enjoining these operations and to obtain accountings for the oil extracted. The situation is strikingly important and urgent and its proper solution depends in a very large degree upon a speedy decision of the questions presented by this case.

REASONS FOR CALLING UP THE WHOLE RECORD AND CAUSE.

The motion in this regard is made with a view to insuring a speedy and final determination, by this court, of the crucial question of the President's authority to make the withdrawals above described. To this end, it is submitted, the court should have before it the entire cause, with full liberty to consider every question, whether patent or latent, primary or subsidiary, existing in the record, unhampered by the peculiar restrictions which affect the jurisdiction when a cause is determined upon questions certified merely.

To illustrate: It may possibly be contended that the first two questions certified are too broad in that they can not be answered without first determining, more clearly than the order of withdrawal itself reveals them, what the specific purposes of the withdrawal were. It is the contention of the Government, made in both courts below, that these purposes are readily and properly ascertained by resort to the judicial knowledge of the court assisted by messages of the President, reports of proceedings before the

committees of Congress, and other public documents. If the court should be of the opinion that this contention raises a distinct point or points not proper to be disposed of in dealing with questions 1 and 2, the task of answering those questions might, conjecturally, become an impossible one, if the validity of the withdrawal were held to depend upon the nature of the purposes for which it was made. If answers to questions 1 and 2 were declined, answers to the remaining questions would but serve to clear the way somewhat for a decision of the ultimate and crucial question by the Circuit Court of Appeals, and a subsequent return to this court by way of appeal would undoubtedly follow, after much regrettable delay, attended by injury to both public and private interests.

Again, the questions certified do not call upon this court to determine the bearing of the Act of June 25, 1910, *supra*, upon withdrawals made before its approval.

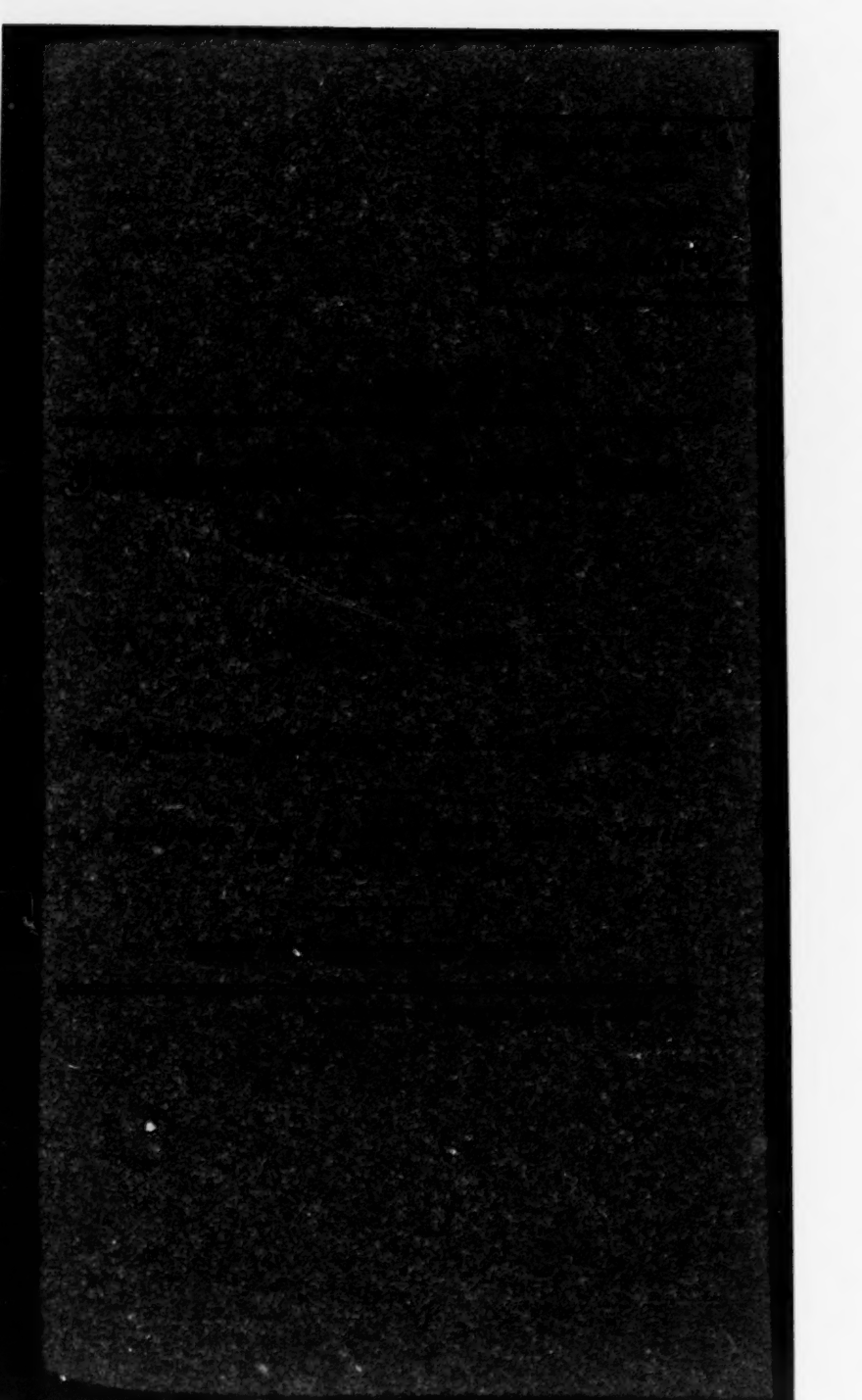
We are authorized to state that counsel for the appellees concur in the desire that the entire cause be brought up for final determination in this court and that it be advanced for early hearing.

Respectfully submitted.

JOHN W. DAVIS,
Solicitor General.

ERNEST KNAEBEL,
Assistant Attorney General.

NOVEMBER, 1913.



INDEX.

	Page.
STATEMENT -----	1
PURPOSES OF THE RESERVATION IN CONTROVERSY-----	6
ANALYSIS OF DEFENDANTS' ARGUMENT-----	14
ANALYSIS OF THE GOVERNMENT'S ARGUMENT-----	14

ARGUMENT.

<p>I. The authority of the President is sustained by the consent of Congress, presumed from uniform acquiescence in and repeated approvals of the Executive practice of making reservations for public purposes -----</p> <p> 1. The authority may be readily implied independently of user and express recognition by Congress-----</p> <p> 2. Discussion of authorities sustaining the implied power-----</p> <p> (a) Authorities relating particularly to military reservations..</p> <p> (b) Authorities relating particularly to Indian reservations..</p> <p> (c) Authorities sustaining reservations made in aid of proposed legislation -----</p> <p> 3. Further discussion of the Executive practice and legislative recognition -----</p> <p> 4. Inapplicability of certain authorities relied on by the defendants-----</p>	<p>18</p> <p>18</p> <p>20</p> <p>21</p> <p>30</p> <p>36</p> <p>47</p> <p>61</p>
---	---

II

	Page.
II. In the absence of any congressional inhibition, the President, of national necessity and by the very nature of his functions under the Constitution, is impliedly authorized to reserve public land for public purposes-----	67
1. This authority is subordinate to the power of Congress -----	67
2. The authority involves no conflict with the general land laws -----	67
3. Reservations for public purposes may be demanded as a duty to the Nation-----	69
4. The duty to make reservations for public purposes is one which necessarily must be delegated to the President for its efficient performance in emergencies-----	70
5. The duty to act in case of necessity devolves upon the President as a part of his constitutional responsibility-----	73
6. An executive reservation implies no invasion of the province of Congress-----	91
7. The executive practice, acquiesced in by Congress and upheld by the courts, affords a practical construction of the President's authority under the Constitution -----	96
III. The mining law is in no way inconsistent with the implied power of reservation-----	97
CONCLUSION -----	103
APPENDIX -----	107

CITATIONS.

<i>Atlantic & Pacific R. R.</i> (6 L. D., 84)-----	62
<i>Barker v. Harvey</i> (181 U. S., 481)-----	97
<i>Behrends v. Goldsteen</i> (1 Alaska, 518)-----	20, 26, 101
<i>Brandon v. Ard</i> (211 U. S., 11)-----	62
<i>Brown v. Walker</i> (161 U. S., 591)-----	94
<i>Bullard v. Des Moines, &c., R. Co.</i> (122 U. S., 167) -	21, 40, 47
<i>Butte City Water Co. v. Baker</i> (196 U. S., 119)-----	18, 96

III

	Page.
<i>Catlin v. Northern Pacific R. R.</i> (11 L. D., 511)-----	29
<i>Colorado Springs Co. v. American Pub. Co.</i> (97 Fed., 843)-----	59
<i>Debs, In re</i> (158 U. S., 564)-----	75, 80
<i>Donnelly v. United States</i> (228 U. S., 243; 708)-----	20
<i>Dubuque, &c., R. Co. v. Des Moines Valley R. Co.</i> (109 U. S., 329)-----	21
<i>Dubuque & Pacific R. Co. v. Litchfield</i> (23 How., 66)-----	37
<i>Gibson v. Anderson</i> (131 Fed., 39)-----	20, 31, 101
<i>Grisar v. McDowell</i> (6 Wall., 363)-----	20, 21, 54
<i>Hewitt v. Schultz</i> (180 U. S., 139)-----	62
<i>Homestead Co. v. Valley R. R.</i> (17 Wall., 153)-----	21, 39
<i>Knight v. Land Assn.</i> (142 U. S., 161)-----	19
<i>Laura, The</i> (114 U. S., 411)-----	94, 96
<i>Leavenworth, &c., R. Co. v. United States</i> (92 U. S., 733)-----	98, 100
<i>Lecky v. United States</i> (190 Fed., 289)-----	64
<i>Light v. United States</i> (220 U. S., 523)-----	96
<i>Litchfield v. Webster County</i> (101 U. S., 773)-----	21
<i>Lockhart v. Johnson</i> (181 U. S., 516)-----	64
<i>Longnecker's case</i> (30 L. D., 611)-----	102
<i>McCulloch v. Maryland</i> (4 Wheat., 316)-----	75
<i>McFadden v. Mountain View Min. & Mill. Co.</i> (97 Fed., 670)-----	20, 98
<i>Neagle, In re</i> (135 U. S., 1)-----	81, 88
<i>Nelson v. Northern Pacific R. R.</i> (188 U. S., 108)-----	62
<i>Northern Pacific R. R. v. Davis</i> (19 L. D., 87)-----	62
<i>Northern Pacific R. R. v. Miller</i> (7 L. D., 100)-----	62
<i>Northern Lumber Co. v. O'Brien</i> (139 Fed., 614)-----	64, 98
<i>Ohio Life Ins., etc., Co. v. Debolt</i> (16 How., 416)-----	72
<i>Riley v. Welles</i> (154 U. S., 578)-----	21, 39
<i>Robertson v. Downing</i> (127 U. S., 607)-----	58
<i>Scott v. Carew</i> (196 U. S., 100)-----	20, 26, 61, 98
<i>Siebold, Ex parte</i> (100 U. S., 371)-----	75
<i>Spalding v. Chandler</i> (160 U. S., 394)-----	20
<i>Spencer v. McDougal</i> (159 U. S., 62)-----	104
<i>United States Bank v. Dandridge</i> (12 Wheat., 64)-----	59
<i>United States v. Bailey</i> (9 Pet., 238)-----	56

IV

	Page.
<i>United States v. Beebe</i> (127 U. S., 338)-----	16
<i>United States v. Copper Co.</i> (196 U. S., 207)-----	61
<i>United States v. Des Moines Nav., etc., Co.</i> (142 U. S., 510)-----	21
<i>United States v. Fitzgerald</i> (15 Pet., 405)-----	61
<i>United States v. George</i> (228 U. S., 14)-----	61
<i>United States v. Grand Rapids, etc., R. Co.</i> (154 Fed., 131)-----	20, 21
<i>United States v. Grimaud</i> (220 U. S., 506)-----	96
<i>United States v. La Compagnie Francaise des Cables Telegraphiques</i> (77 Fed., 495)-----	80
<i>United States v. Leathers</i> (6 Sawy., 17)-----	20, 30
<i>United States v. Lee</i> (106 U. S., 196)-----	104
<i>United States v. Macdaniel</i> (7 Pet., 1)-----	59
<i>United States v. Martin</i> (14 Fed., 817)-----	20, 34
<i>United States v. Payne</i> (8 Fed., 883)-----	20, 31
<i>United States v. San Jacinto Tin Co.</i> (125 U. S., 284)-----	105
<i>United States v. Sturgeon</i> (6 Sawy., 29)-----	20
<i>United States v. Tin Co.</i> (125 U. S., 273)-----	86
<i>United States v. Trinidad Co.</i> (137 U. S., 160)-----	15
<i>Wells v. Nickles</i> (104 U. S., 444)-----	59, 85
<i>Wilcox v. Jackson</i> (13 Pet., 496)-----	19, 98
<i>Williams v. Baker</i> (17 Wall., 144)-----	21, 39
<i>Wilson, In re</i> (140 U. S., 575)-----	20
<i>Wolcott v. Des Moines Co.</i> (5 Wall., 681)-----	19, 21, 37
<i>Wolsey v. Chapman</i> (101 U. S., 755)-----	21, 39
Land decisions:	
Vol. 1, 703-----	30
Vol. 6, 84-----	62
Vol. 7, 100-----	62
Vol. 11, 511-----	29
Vol. 13, 426-----	20, 29
Vol. 19, 87-----	62
Vol. 29, 32-----	20, 29
Vol. 30, 611-----	102
Vol. 34, 245-----	53
Vol. 35, 11, 572-----	53, 54

V

Opinions Attorney General:

	Page
16 Op., 121.....	20
17 Op., 160.....	20, 27
17 Op., 230.....	20, 28, 102
17 Op., 258.....	20, 34
19 Op., 370, 371.....	20, 35
22 Op., 13.....	77
23 Op., 589.....	64
29 Op., 579.....	80

APPENDIX.

Withdrawal order of September 27, 1909.....	107
Correspondence leading to the withdrawal order of September 27, 1909.....	108
Letter from Director of Geological Survey to Secretary of the Interior, February 24, 1908....	108
Letter from Director of Geological Survey to Secretary of the Interior, September 17, 1909..	110
Letter from Secretary of the Interior to the Presi- dent, September 17, 1909.....	112
Telegram from Secretary of the Interior, from Salt Lake City, to Acting Secretary of the Inte- rior, Washington, D. C., September 26, 1909....	115
Telegram from Acting Secretary of the Interior to Secretary Ballinger.....	115
References to report of Secretary of the Interior and presidential messages.....	115
Recommendation of General Board of Navy, January 8, 1908.....	120
Letter of Acting Secretary of the Navy, June 25, 1912, to Secretary of the Interior.....	121
References to legislation pending when order of Sep- tember 27, 1909, was made and introduced soon afterwards.....	123
Act of June 25, 1910 (36 Stat., 847).....	126
References to legislative proceedings attending pas- sage of the act of June 25, 1910, and report of Sen- ate committee.....	128
Report of Senate committee on withdrawal legisla- tion.....	130



In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES	} No. 750.
v.	
THE MIDWEST OIL COMPANY ET AL., AP- pellees.	

*ON A CERTIFICATE FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT*

STATEMENT.

This case was originally heard, in the District Court for the District of Wyoming, upon defendants' motion to dismiss the Government's bill. That court sustained the motion and entered a final decree accordingly. Upon appeal, the Circuit Court of Appeals for the Eighth Circuit certified certain questions of law to this court. This court has since called up the whole record, and the cause is now here in its entirety for final determination.

The object of the bill is to enjoin the defendants from trespassing upon a certain tract of public

petroleum land in the State of Wyoming and to obtain an accounting for petroleum wrongfully extracted therefrom. After averring ownership by the United States, and the fact that the land is chiefly valuable for petroleum, the bill alleges that on September 27, 1909, the particular tract in controversy, in common with many others of like character, was withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry, or disposal, under the mineral or nonmineral public-land laws, by an order promulgated on that date by the Secretary of the Interior pursuant to the direction of the President. A copy of this order (omitting the descriptions of other lands) is attached to the bill and is incorporated into the pleading by reference. (R., 2, 8.) We reproduce it in the appendix of this brief, page 107. The order lists townships and sections aggregating more than 3,000,000 acres, situate in Wyoming and California, and purports to withdraw all of the public lands contained within those descriptions. Omitting the list, it reads:

TEMPORARY PETROLEUM WITHDRAWAL NO. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral

public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

It will be observed that the purpose of the withdrawal, as declared in the order itself, was to aid proposed legislation affecting (1) the *use* and (2) the *disposition* of the deposits of petroleum in public lands. The bill does not undertake to explain the details of the proposed legislation or the nature of the use or the disposition in view. This subject is elucidated by various public documents, including messages of the President, which were used by both sides at the argument and will be referred to more particularly below. Some of them are included in the record. (R., 19, 20.) Suffice now to say that they show the President was actuated first by the necessity of conserving a supply of fuel oil for the future use of the Navy, and second by a desire to effectuate an executive policy and a growing movement in Congress (evidenced, in part, by pending bills) to do away with the waste and other abuses existing under the petroleum placer law, and to substitute some other and wiser way of disposing of petroleum deposits to private interests.

At the time when this reservation was made there was no statute which gave expressly the authority to make it. Such a statute was afterwards enacted and approved June 25, 1910. (Appendix p. 126.) It authorizes withdrawals "for water-power sites,

irrigation, classification of lands, or other public purposes "; declares that lands so withdrawn shall remain open under the mining laws " so far as the same apply to minerals other than coal, oil, gas, and phosphates," and provides:

That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act.

The Senate committee which reported this bill construed it as a *limitation* upon the existing power of the President. (See report and proceedings in the Appendix, *infra*, p. 128.)

On July 2, 1910, the President approved a second order (set up by the bill, R., 3, 9) which in terms ratified and confirmed the first order and continued it in full force and effect. Neither of the two orders has been revoked or modified so far as the land in controversy is concerned.

According to the allegations of the bill, the land was free from any possession or claim, by the de-

fendants or others, not only at the date of the first withdrawal but continuously thereafter until March 27, 1910. On that date, it is charged, certain persons, called the original claimants, entered upon it without license or authority from the plaintiff and began to explore it for petroleum. The bill further charges that the exploration continued until May 5, 1910; that a discovery of petroleum resulted on that date; that on May 4, 1910, a location certificate, evidencing a claim to the land as a petroleum placer under the Federal mining laws, was filed in the county records of Natrona County, Wyoming, by the original claimants; and that the defendants, claiming through mesne conveyances under this pretended location, have extracted large quantities of oil and threaten to continue to do so. The prayer is for an injunction, an accounting, and the quieting of the plaintiff's title.

Without making any objection to the form or statement of the bill, the defendants moved to dismiss it on the merits, specifying as the grounds of the motion that the bill showed upon its face, first, that the plaintiff was not entitled to the relief prayed, second, that the order of September 27, 1909, was unauthorized and void, and, third, that the defendants were claiming under a valid location made under the mining laws before the date of the second order, July 2, 1910, and protected by the express terms of the act of June 25, 1910, *supra*.

The general mining law allows exploration, location, and purchase of lands of the public domain

which contain valuable mineral deposits. (R. S., sec. 2318 et seq.) The act of February 11, 1897 (29 Stat., 526), provides:

That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims.

In a brief written opinion (R., 25), stating merely the issue and the conclusion, the District Court upheld the position of the defendants. The effect is to treat the President's first order as a bit of waste paper. As the defendants and their predecessors were strangers to the land in controversy until months after that order was promulgated, the bald question presented is whether the President's act was absolutely void. If it was valid for any purpose it was effective to reserve the land from subsequent occupation and location.

Purposes of the reservation.

In our argument we will assume that the executive department, even by the personal act of the President himself, may not arbitrarily and capriciously withhold public lands from the operation of the public-land laws. At the same time we take it for granted that a reservation by the President will be upheld, if it may be upheld upon any possible hypothesis, and that it is not the duty of the Gov-

ernment when assailing trespassers to allege and prove the underlying purposes of the reservation. In this case, however, the reasons for the action are clearly revealed. In his message of December 6, 1910 (Appendix, p. 116), the President, referring to this and other oil-land withdrawals, said:

In September, 1909, I directed that all public oil lands, whether then withdrawn or not, should be withheld from disposition pending congressional action, for the reason that the existing placer-mining law, although made applicable to deposits of this character, is not suitable to such lands, and for the further reason that it seemed desirable to reserve certain fuel-oil deposits for the use of the American Navy.

Again:

The principal underlying feature of such legislation should be the exercise of beneficial control rather than the collection of revenue. As not only the largest owner of oil lands, but as a prospective large consumer of oil by reason of the increasing use of fuel oil by the Navy, the Federal Government is directly concerned, both in encouraging rational development and at the same time insuring the longest possible life to the oil supply.

The importance of oil as a naval fuel, in increasing the speed and steaming radius of ships and enhancing their efficiency in other ways, has now be-

come a matter of notoriety and common knowledge. In 1908 the General Board of the Navy recommended that oil be used as an auxiliary in the large ships and as the sole fuel of all destroyers and smaller vessels (Appendix, p. 120). In a letter to the Secretary of the Interior, of June 25, 1912 (*ib.*, p. 121), the Acting Secretary of the Navy stated that the use of oil is necessary to maintain the superiority of our vessels over the vessels of other powers, but that the definite adoption of oil burning must be preceded by the assurance of an adequate oil supply, since, with our vessels fitted only to this fuel, "a failure of the supply might constitute a national calamity."

February 24, 1908, the Director of the Geological Survey, by a letter of that date (Appendix, p. 108), called the attention of the Secretary of the Interior to the importance of conserving oil in the public lands for the use of the Navy, and recommended that the filing of claims upon oil lands (mentioning specifically those in the State of California) be suspended, "in order that the Government may continue ownership of valuable supplies of liquid fuel in this region where all fuel is expensive." He affirmed that the areas in which the probabilities of finding large deposits were greatest had already been prospected, and that the areas of probable oil territory then remaining under Government control were rapidly being filed on and patented, either lawfully or fraudulently. He emphasized

the necessity of prompt action upon the part of the Government, saying:

The present rate at which the oil lands in California are being patented by private parties will make it impossible for the people of the United States to continue ownership of oil lands there more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away.

In a letter to Secretary Ballinger of September 17, 1909 (Appendix, p. 110), the director showed that the production of petroleum had come to exceed the legitimate demand; that the disposal of public petroleum lands at nominal prices encouraged overproduction; and that the practice of drilling wells close to boundary lines of private holdings demanded a change in the law, that disposition by the Government might be in barrels of oil rather than acres of land. The object of this letter was to support and renew the previous recommendation that oil lands be reserved for naval use. Secretary Ballinger thereupon wrote to the President September 17, 1909 (Appendix, p. 112), bringing to his attention "the subject of the conservation of the petroleum resources of the public domain, *with special reference to the present and future requirements of the American Navy.*" He mentioned also the overproduction encouraged by the law as it then stood, and the losses to the public resulting from the

method of drilling wells close to private boundaries, and concluded:

The time appears opportune for legislative action that will assure the conservation of an adequate supply of petroleum for the Government's own needs. *This legislation should give authority to fix the terms of disposition of public oil lands so as to provide for the future demands of the Navy and should also authorize the permanent reservation of such areas as the Executive, after full investigation, may find necessary for this Federal purpose.* It is believed that such legislation would not interfere with the profitable development and utilization of the California oil pools.

In aid of such legislation, and, indeed, as *essential* to the accomplishment of its purpose, all the lands hereinbefore mentioned should be temporarily withdrawn from all forms of filing, entry, and disposal, including mineral entry.

Soon afterwards the withdrawal now in controversy was directed by the President. The above-mentioned letters appear in the printed report of the hearings held by the House Committee on Public Lands May 13 and 17, 1910, on House bill No. 24070, from which the act of June 25, 1910, *supra*, was derived.

From this history, read with the extracts we have given from the President's message, it is evident that the immediate purpose of the order was to conserve a supply of fuel for the Navy. We state

this as an unquestionable proposition of fact. It is evident, too, that in the absence of prompt action the purpose would or might have been defeated. There was an emergency ; there was no time to wait for the action of Congress.

Correlated with this purpose was the more general object of conserving one of the most important, but limited, resources of the public domain for the benefit of the whole people, with a view to future disposition in such wise and economic ways as would provide adequate public control, insurance against waste and monopoly, and some public revenue, on the one hand, and proper protection to the private operation on the other. It can not be doubted that the conditions which had grown up under the petroleum placer law, especially in California, were productive of frauds, confusion in administration, and signal waste. And the losses, actual and threatened, affected not only the deposits in lands acquired by individuals and corporations, but also those in the lands retained by the Government. See the President's messages of January 14, 1910, and December 6, 1910. (Appendix, p. 116.) As we have said, there was a growing movement in Congress to remedy this condition. The bills on the subject which had been introduced in the Fifty-ninth and Sixtieth Congresses were quite numerous. This withdrawal was made during the interval between the first and second sessions of the Sixty-first Congress. We give in the Appendix (p. 123) a list including cer-

tain measures which were introduced at the first session and were pending when the withdrawal occurred, and others introduced at the second session, of which a number antedated the claim of the defendants. Of the former, Senate bill 438 and House bills 9771 and 9964 related only to oil lands in California. Senate bills 597 and 2623 related to all oil lands. The effect of these bills, if passed, would have been to repeal the old law and impose limitations and restrictions upon the interests that might be acquired in oil lands. Senate bill 597 was particularly comprehensive in this respect. Leaving out of account the numerous bills (introduced between January 5, 1910, and April 18, 1910) which expressly authorized the President to withdraw oil lands for public purposes, and which may justly be regarded as expressing a command or legislative policy as well as a mere permission, we find in this proposed legislation measures seriously devised for the conservation and economic use of coal, oil, asphalt, gas, and phosphate deposits of the United States. Their aim is to prevent fraud, monopoly, and waste. They require reasonable pecuniary returns to the United States, limit the interest which an individual or corporation may acquire, and provide for public supervision, leaving much to the discretion of the Secretary of the Interior. Some of the bills introduced in January were without doubt the bills which the President mentions in his message of January 14, 1910, as having been framed with his approval, and these

must have been in contemplation when the withdrawal was made. The whole subject was before Congress long before the defendants' claim accrued. It was widely discussed, of general notoriety, and was elaborated in the January message. And Congress, although it was unable to agree upon positive regulations for the future use and disposition of these mineral deposits, declared in favor of reserving them in the United States until it could determine upon some more definite course. No other construction can be put upon the act of June 25, 1910. Its necessary import is to approve the policy of reserving the oil and the other minerals specified and to approve the reservations previously made.

Although in the bills referred to there is no express mention of the naval use, this matter was fully protected by the provisions for Executive reservations, and by the wide discretion which the principal bills conceded to the Executive in the disposition of oil deposits.

In the light of the situation which existed when the first withdrawal was made, and subsequent developments, the language used in the order, "in aid of proposed legislation affecting the use and disposition," etc., needs no further explanation. There were two public purposes, first, to conserve oil for the naval use, partly by reserving specific lands and partly by public control over exploitation of the others, and, second, to assist Congress to do

away with acute public evils resulting from the existing laws of disposition.

Analysis of defendants' argument.

Defendants contend (1) that the power of Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Art. IV, sec. 3) is not only paramount, but so absolutely exclusive that no authority can exist in the Executive respecting the public lands, even to use or appropriate them temporarily to meet great public necessities, unless it be deducible from some act of Congress; (2) that no authority to make a reservation like the one in question existed under the acts before the act of June 25, 1910; and (3) that even if such an authority might otherwise be conceded, its application to mineral lands is forbidden by the mining law. This last proposition seems to be particularly relied on. It assumes that the mining law, because it gives the right to explore for and purchase all mineral deposits and contains no express exceptions, necessarily imports an intention of Congress to dedicate all mineral lands to private acquisition and to forbid the reservation or use of any part of them for public purposes.

Analysis of the Government's argument.

Our argument naturally divides into three heads:
1. The first and (in view of the help afforded by

executive, legislative, and judicial construction) perhaps the simplest answer to the defendants' contention is that the authority of the President to reserve public lands for public purposes has long existed by the will and sanction of Congress.

This authority has been exercised repeatedly and increasingly since the early days of our national history. Congress, with full knowledge, has never disapproved of it, but, on the contrary, has manifested its approbation again and again by acts recognizing the practice as beneficent and lawful. Congress did not disapprove of the reservation now in question; it approved it by the act of June 25, 1910, *supra*. In numerous cases the authority has been considered by the courts and the Attorney General and always has been upheld.

2. The authority to reserve public lands temporarily to meet public necessities inheres in the President under the Constitution, subject, of course, to the paramount authority of Congress. Such a reservation is simply a tentative appropriation to a public purpose of public property which Congress has not appropriated to any other purpose. The act involves no intrusion, direct or indirect, upon the legislative prerogative, since it has no legislative quality and does not even tend to remove the subject matter from legislative control.

The public lands are national property, held "in trust for all the people" (*United States v. Trinidad*

Co., 137 U.S., 160, 170; *United States v. Beebe*, 127 U. S., 338 342), and destined to be devoted to the national welfare, including, of course, the convenience of government, the national safety, and the common defense. When it becomes evident that a pressing need exists, or will exist, to use specific tracts for governmental purposes, a duty at once arises as pressing as the need to safeguard the lands required. This is not a duty created by any statute; its roots are in the Constitution itself and it springs up with the necessity. Congress, having been given plenary control of the public lands by the Constitution, is privileged to ignore the duty, if it sees fit; but this will not be presumed. Congress may appropriate the lands itself, or it may authorize the President or some one else to do so. When, however, the necessity has not been anticipated by legislation, so that Congress has not expressed its controlling will one way or the other concerning it, and when the recognition of its existence occurs at such a time and in such circumstances that it would be unwise and dangerous to defer action, the duty to set apart the required tracts (subject to the future disposal of Congress) devolves with all its weight upon the President. If this be not so, there is no one who can act; the Nation is impotent to protect itself, and its interests must be sacrificed. The President's functions under the Constitution are such as to point to him, and him alone, as the active

agent of the Government who can and must meet the emergency.

While these considerations apply with peculiar force to a reservation made in contemplation of a direct use by the Government, they avail also to uphold a reservation whose object is generally to avert the waste and destruction of an important national resource which threaten to result from a general land law operating in conditions not present or anticipated when the law was passed. This is especially true when the emergency leaves no time for legislative action and when remedial legislation is proposed or actually pending.

3. The proposition that the general language of the mining law precluded the reservation is not to be regarded as a serious element in the case. There is not a word in it to indicate an intention to interfere with this authority of the President which Congress had approved of and relied on for ^{many} ~~years~~ ~~a century~~ when the first mining law was passed. Even if doubtful, the law could not be construed as designed to abolish a governmental authority so useful and so necessary. But there is not even an apparent repugnancy between the law and the authority, since the former, like all the general land laws, offers to its beneficiaries only those lands which are unappropriated when they seek to enjoy its bounty.

ARGUMENT.

I.

The authority of the President is sustained by the consent of Congress, presumed from uniform acquiescence in and repeated approvals of the executive practice of making reservations for public purposes.

1. *The authority may be readily implied independently of user and express recognition by Congress.*

The general land laws are, in essence, mere offers of rights and privileges in the public lands upon stated conditions. As this court said, in *Butte City Water Co. v. Baker* (196 U. S., 119, 126) :

The Nation is an owner, and has made Congress the principal agent to dispose of its property. * * * While the disposition of these lands is provided for by congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term * * *.

These offers are continuing general offers, and the subject matter offered is vast, unidentified, and unknown. No private owner in his right senses would make such an offer if he were not conscious of his ability to observe its operation and modify or retract it instantly where it threatened destruction to his own interests. It is not lightly, therefore, that a different intention may be imputed to the "principal agent" of the Government. For,

as this court has observed of the preemption right, which is in no sense inferior to the right to locate mines:

We can not suppose that this bounty was designed to be extended at the sacrifice of public establishments or of great public interests. *Wilcox v. Jackson*, 13 Pet. 496, 514.

A power in the Executive to except specified tracts temporarily, when the disposition of them would result in grave public injury, is of national necessity. The power could be readily inferred even though it had never been exercised or recognized in congressional enactment. The assumption of its existence would be fully justified by the necessity, by the fact that Congress has made the Executive "the guardian of the people of the United States over the public lands" (*Knight v. Land Association*, 142 U. S., 161, 181), and by the fact that these general bounty laws are not evidence of an intention to part with the particular tracts reserved. The Executive has acted upon this assumption from an early day, and this court has declared its opinion that, independently of any statute, the power, "which has been exercised down to the present time," had existed "ever since the establishment of the Land Department." (*Wolcott v. Des Moines Co.*, 5 Wall., 681, 688.) But as most of the many authorities which have sustained this power of reservation (and we know of none that has not) invoke both user and legislative recognition, we will pursue the discussion upon that basis.

2. Discussion of authorities sustaining the implied power.

The following are the authorities bearing on our subject:

(a) Sustaining military reservations—

Grisar v. McDowell, 6 Wall., 363.

Scott v. Carew, 196 U. S., 100.

Behrends v. Goldsteen, 1 Alaska, 518, 524 (naval reserve).

17 Op., 160 (MacVeagh, July 15, 1881).

17 Op., 230 (MacVeagh, Oct. 21, 1881).

13 L. D., 426 (Shields, Assistant Attorney General, June 17, 1890).

29 L. D., 32 (Van Devanter, Assistant Attorney General, July 17, 1899).

(b) Sustaining Indian reservations—

United States v. Leathers, 6 Sawy., 17; Fed. Cas. No. 15581.

United States v. Payne, 8 Fed., 883.

United States v. Sturgeon, 6 Sawy., 29.

United States v. Martin, 14 Fed., 817, 821.

McFadden v. Mountain View Min. & M. Co. (C. C. A., 9th Cir.), 97 Fed., 670.

Gibson v. Anderson (C. C. A., 9th Cir.), 131 Fed., 39.

United States v. Grand Rapids, &c., R. Co., 154 Fed., 131.

16 Op., 121 (Devens, Aug. 10, 1878).

17 Op., 258 (Brewster, Jan. 17, 1882).

19 Op., 370 (Miller, July 31, 1889).

See, also, *In re Wilson*, 140 U. S., 575.
Spalding v. Chandler, 160 U. S., 394, 403.
Donnelly v. United States, 228 U. S., 243; 708.

(c) Sustaining reservations made in aid of proposed legislation:

Wolcott v. Des Moines Co., 5 Wall., 681.

Riley v. Welles (decided in 1870 but reported much later), 154 U. S., 578.

Williams v. Baker, 17 Wall., 144.

Homestead Co. v. Valley Railroad, ib., 153.

Wolsey v. Chapman, 101 U. S., 755.

Litchfield v. Webster County, ib., 773.

Dubuque, etc., R. Co. v. Des Moines Valley R. Co., 109 U. S., 329.

Bullard v. Des Moines, &c., R. Co., 122 U. S., 167.

United States v. Des Moines Nav., &c., Co., 142 U. S., 510.

The above are the so-called Des Moines River cases. The withdrawal there in question was first made under an erroneous interpretation of a grant and afterwards held in force in the expectation that Congress would extend the grant so as to include the lands reserved.

United States v. Grand Rapids, &c., R. Co., 154 Fed., 131.

(a) *Authorities relating particularly to military reservations.*

In *Grisar v. McDowell* (6 Wall., 363) the plaintiff, under a conveyance by the city of San Francisco, claimed title to certain lands which, prior to the conveyance, had been reserved by the Presi-

dent, *without statutory authority*, for a military reservation, but which at the time of the conveyance, and for a number of years thereafter (until plaintiff was ousted by the defendant, a military officer), had been actually improved, cultivated, and inhabited by the plaintiff and those through whom he claimed title from the city. The claim of the city, which stood back of this and other conveyances to individuals, was based upon its successorship to a pueblo, which had been entitled to a grant under the laws of Mexico. That claim had been confirmed by a decree of the Circuit Court of the United States for four square leagues, *including the premises in dispute*, subject to certain exceptions, among which were all such parcels of land as had been previously "reserved or dedicated to public uses *by the United States.*" The decree was made in May, 1865 (p. 377). It was confirmed by an act of Congress in 1866, "subject, however, to the reservations and exceptions designated in the decree" (p. 378). The President's reservation had been made in 1851. As the court held that the decree and the act measured the title of the city, and consequently that of the plaintiff, it became a very important question whether the withdrawal by the President was a reservation or dedication "by the United States." It was objected (see p. 380), first, that the lands in controversy were not public domain but the property of the city when the order of the President was made. This the court

disposed of by holding that all the lands included in the city's claim remained the property of the United States until, through the judicial proceedings and the act of Congress (all subsequent to the order), the lands which the city was to have were definitively set off and measured by the authority of the Government.

Secondly, it was objected (*ib.*) that, even if the lands in controversy did constitute a part of the public domain when the President acted, "they could only be reserved from sale and set apart for public purposes under the direct sanction of an act of Congress." Concerning this contention the court said (p. 381):

But further than this: From an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

The authority of the President in this respect *is recognized* in numerous acts of Congress. Thus, in the preemption act of May 29, 1830, it is provided that the right of preemption contemplated by the act shall not "extend to any land which is reserved from sale by act of Congress, or *by order of the President*, or which may have been appropriated for any purpose whatever." Again, in the preemption act of September 4, 1841,

“ Lands included in any reservation by any treaty, law, or *proclamation of the President* of the United States, or reserved for salines or for other purposes,” are exempted from entry under the act. So by the act of March 3, 1853, providing for the survey of the public lands in California, and extending the preemption system to them, it is declared that all public lands in that State shall be subject to preemption, and offered at public sale, with certain specific exceptions, and among others “ of lands appropriated under the authority of this act, or *reserved by competent authority.*” The provisions in the acts of 1830 and 1841 show very clearly that by “ competent authority ” is meant the authority of the President and officers acting under his direction.

The action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them. The reservations made at the same time embraced seven distinct tracts of land, and upon several of them extensive and costly fortifications and barracks and other public buildings have been erected.

The court also said (p. 380) :

On the other hand, if the lands were at the time a part of the public domain, as they must be considered to be, because they have been excluded from the lands confirmed to the city in satisfaction of the claim, it is of

no consequence to the plaintiff whether or not the President possessed sufficient authority to make the reservations in question. It is enough that the title had not passed to the plaintiff, but remained in the United States.

Because of this statement, it has been urged that the language first quoted was *obiter*. But this surely can not be correct, since the question whether the President's act was void or not was exceedingly germane to the inquiry whether the lands were in fact excluded from the confirmation. They were not, unless they were so far "reserved or dedicated to public purposes by the United States" as to fall within the exception, couched in those words, in the decree of confirmation.

Furthermore, the declarations concerning the President's implied authority were solemn and explicit; they have stood unquestioned for nearly 50 years; they have been cited and greatly relied on by the courts and the executive departments, if not by Congress, and it is too late now to question their authority.

It will be observed that the validity of the reservation was not made to depend upon the subsequent appropriation acts. They were cited merely as cumulative evidence of the congressional recognition. It will be noted also that the language quoted from the preemption acts was relied on not merely as conferring a power to withhold land from pre-

emption, but as recognizing a power, existing, to withhold it from any disposition. If the plaintiff had been claiming under a law, like the mining law, which contains no express exception, the result would have been the same. In fact, his claim was not based on any of the land laws.

In *Scott v. Carew* (196 U. S., 100) it was held that an act passed in 1826, which opened lands in Florida to preemption, could not be deemed to apply to lands which had been first occupied by troops and afterwards formally reserved by the President for military purposes. The court said (p. 114):

It was until the post was abandoned an appropriation of the land for military purposes. Quite a number of reservations and posts in our Western territory once established have afterwards been abandoned, but while so appropriated they are excepted from the operation of the public land laws, and no right of an individual settler attaches to or hangs over the land to interfere with such action as the Government may thereafter see fit to take in respect to it. No cloud can be cast upon the title of the Government—nothing done by an individual to embarrass it in the future disposition of the land.

Behrends v. Goldsteen (1 Alaska, 518, 524), holds that land reserved for naval uses by the Secretary of the Navy is not subject to mining location.

In his opinion of July 15, 1881 (17 Op., 160), Attorney General MacVeagh, after stating that the power of the President to make reservations of public lands for public purposes is too well established to admit of doubt, and referring to *Frisbie v. Whitney* (9 Wall., 187), and the *Yosemite Valley Case* (15 Wall., 77), respecting the right of a preemption settler as against the Government, said (p. 163):

It should be borne in mind that the power of the President here referred to is recognized by Congress (*Grisar v. McDowell, supra*). *Such recognition is equivalent to a grant.* Hence, in reserving and setting apart a particular piece of land for a special public use, the President must be regarded as acting by authority of Congress, and unless this authority is so restricted as not to extend to land covered by a preemption filing (and I am not aware of any restriction of that sort), I do not see why such land may not be as effectually reserved and set apart by the President thereunder as by the direct action of Congress. Land so covered, where payment and entry have not been made, is subject to appropriation or disposal by Congress simply because, although occupied with a view to preemption, the settler has not by virtue of his occupancy acquired any interest whatever therein as against the Government, and it still remains a part of the public domain, over the disposition of which Congress has full control. Upon the same ground (namely, the absence of any right in

the settler to the land as against the Government, and the fact that it continues in the absolute ownership of the latter) such land would seem to be subject to reservation for public uses by the President when acting by authority of Congress.

Again, on October 21, 1881, the same Attorney General advised the Secretary of War (17 Op., 20,) that *mineral land* might be so reserved by the President for military or other public purposes. Re-affirming the opinion last cited, he said (p. 232) :

This power is in the above-mentioned opinion regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated. As thus defined the power is broad enough to include mineral lands belonging to the public domain, at least whilst they remain unaffected by any private right acquired under the laws relating thereto. I am satisfied with that view of the subject, and accordingly answer the first question in the affirmative. This necessarily involves a negative answer to the second question ; since, after public lands have once been lawfully reserved by the President for public uses, the lands so appropriated become severed from the public domain, and are thenceforth not subject to occupation and purchase under the general law.

The authority has been declared in numerous decisions of the Land Department, among which reference may be made to *Catlin v. Northern Pa-*

cific R. R. (11 L. D., 511, 513); the opinion of Assistant Attorney General Shields, June 17, 1890 (13 L. D., 426); and the opinion of Assistant Attorney General Van Devanter of July 17, 1899 (29 L. D., 32, 33), in which he said:

While there is no specific statutory authority empowering the President to reserve lands of the United States for military purposes, yet the right to direct the use of such lands for public purposes, including military, has been asserted by this department in numerous instances, and has been expressly recognized by the courts and inferentially by various acts of Congress.

After citing *Grisar v. McDowell* and certain opinions of the Attorneys General, he continued (p. 34):

In his opinion of July 31, 1889 (19 Op. Att'y Gen., 370), Attorney General Miller, after discussing certain legislation which limited the quantity of land to be included in reservations for military purposes in the Territory of Oregon, said that the validity of the Executive order then under consideration rested not on the statute referred to but on a long-established and long-recognized power in the President to withhold from sale or settlement at discretion portions of the public domain, said:

"This power Congress recognizes in the legislation above discussed, which does not grant any such power, but only seeks to restrict one already existing. When Congress

creates an exception from a power, it necessarily affirms the existence of such power, and hence the well-known axiom that the exception proves the rule."

There can be no doubt as to the general authority of the President to direct the use of such of the lands of the United States as may in his opinion be necessary therefor for military purposes.

In the first volume of the Land Decisions, page 703, in a discussion of this power, it is said:

That the power resides in the Executive from an early period in the history of the country to make reservations has never been denied either legislatively or judicially, but on the contrary has been recognized. It constitutes in fact a part of the Land Office law, exists *ex necessitate rei*, as *indispensable to the public weal*, and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled ever to be disputed.

(b) *Authorities relating particularly to Indian reservations.*

United States v. Leathers (6 Sawy., 17) involved the question whether a reservation made by executive order on March 23, 1874, brought the land within the Indian liquor statute. Upon the authority of *Wolcott v. Des Moines Co.* and *Grisar v. McDowell*, the reservation was sustained. The court also referred to subsequent appropriation

acts, and to the broad statutory authority of the President in Indian affairs.

United States v. Payne (8 Fed., 883) was an action brought by the United States to recover a penalty for being in the Indian country contrary to law. The defendant pleaded, *inter alia*, that he had made a settlement on the land on which he was found under the preemption and homestead laws. The question then was whether the lands were "included in any reservation by any treaty, law, or proclamation of the President, for any purpose" (sec. 2258, R. S.). The court found that the land had been reserved by force of treaties with the Indians, but said (p. 888):

Now, if the treaty-making power can convey title, it can reserve a part of the public domain for a specific purpose, because this is but the exercise of a less higher power than that which conveys title. So can the President of the United States, by an Executive order, reserve a part of the public domain for a specific lawful purpose. *Wolcott v. Des Moines Co.*, 5 Wall., 681; *Grisar v. McDowell*, 6 Wall., 363.

An important decision is that of *Gibson v. Anderson* (131 Fed., 39) by the Circuit Court of Appeals for the Ninth Circuit. It was there held that a reservation of public lands made by the President, without statutory authority, as an Indian reservation, operated to withdraw the lands from the general mining law, although the reservation

was made long after that law became effective. We quote from the opinion (p. 40) :

To show that there was equity in the bill, the appellant advances the proposition that the act of Congress embodied in section 2319 of the Revised Statutes (U. S. Comp. St. 1901, p. 1424), declaring all mineral deposits in the public lands of the United States open to exploration and purchase, and the lands containing the same to occupation and purchase, can not be repealed or suspended by a proclamation of the President. But there is no question here of repealing or suspending the operation of an act of Congress. The question is whether the President could, by proclamation, reserve a portion of the unoccupied public lands of the United States for an Indian reservation. In *McFadden v. Mountain View Mining & Milling Company* (97 Fed., 670, 38 C. C. A., 354) this court said:

“ There can be no doubt of the power of the President to reserve those lands of the United States for the use of the Indians. The effect of that Executive order was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion upon the territory thus reserved by any and every person other than the Indians for whose benefit the reservation was made for mining as well as other purposes.”

The appellant seeks to distinguish that case from the case at bar by referring to the fact that the proclamation setting aside the

Colville Reservation, which was under consideration in that case, was made before the enactment of section 2319 of the Revised Statutes. But, if the President had the power to set aside a portion of the public domain for an Indian reservation, it is clear that the power was not abridged by the enactment of that statute. Congress did not thereby dispose of any estate in the public lands, or create any burden thereon, or establish any right therein until the actual inception and assertion of mining rights thereunder. Statutory license to locate mining claims has never been held, prior to the acquisition of a vested right, to be an obstacle to either the disposition or the reservation of the public lands. We entertain no doubt of the correctness of our ruling in the McFadden case. The power of the President to create a reservation of public lands for the use and benefit of the Indians and for other purposes has been recognized both by Congress and by the courts—by Congress in enacting subsequent appropriation acts, appropriating money therefor, or other acts, as in this particular case by the act of May 27, 1902, and by the joint resolution No. 24 (32 Stat., pt. 1, 245-277), and joint resolutions Nos. 25 and 31 (32 Stat., pt. 1, 742-744).

After referring to *Grisar v. McDowell* the court added:

The same was held of an Indian reservation created by Executive order in *United*

States v. Leathers, 6 Sawy., 17, Fed. Cas. No. 15581, *United States v. Sturgeon*, 6 Sawy., 29, Fed. Cas. No. 16412, and *United States v. Payne* (D. C.), 8 Fed., 883. There can be no doubt that such a reservation by proclamation of the Executive stands upon the same plane as a reservation made by treaty or by act of Congress.

In *United States v. Martin* (14 Fed., 817, 822) the court, comparing Indian reservations established by treaty and Executive order, held that "the difference in the mode of establishing the two reservations is not material" to their status.

Attorney General Brewster, January 17, 1882 (17 Op., 258), answered affirmatively a question propounded by the Secretary of the Interior as to whether the President had authority to make a reservation for Indians from public land lying within the boundaries of a State. *Grisar v. McDowell* and *Wolcott v. Des Moines Co.*, *supra*, are cited. The opinion then proceeds (p. 260):

It has been shown above that the President has the power *generally* to reserve lands from the public domain for public uses.

In the cases cited the reservation has been for military purposes or for public improvements. Is a reservation for occupation by Indians a reservation for a public use?

By the acts of July 9, 1832 (4 Stat., 564), and 30th of June, 1834 (4 Stat., 738), a Bureau of Indian Affairs was established, and extensive powers were given to the President in the control and management of

the Indians, and our statute book abounds with legislation concerning the Indian and Indian tribes. The regulation of the relations of the Government with these tribes is a great public interest, and their settlement upon reservations has been considered a matter of great importance. Indeed it has been the settled policy of the Government for many years.

A reservation from the public lands therefore for Indian occupation may well be regarded as a measure in the public interest and as for a public use. Congress has in numerous acts of legislation recognized it as such. These statutes need not be particularly referred to; they are scattered through the statute book; indeed the annual Indian bill is full of such recognitions.

See, also, the opinion of Attorney General Miller of July 31, 1889 (19 Op., 371), holding that an act limiting Indian reservations to 640 acres in the Territory of Oregon was not operative in Montana, and that the President was fully empowered to make a reservation of larger dimensions. He states (p. 373):

In my opinion the validity of the Executive order of August 5, 1878, and that of February 19, 1877, to which it was supplemental, rest not on that statute but on a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, such parts of the national domain, open to entry and settlement, as he may deem proper. This power Con-

gress recognizes in the legislation above discussed, *which does not grant any such power, but only seeks to restrict one already existing.* When Congress creates an exception from a power, it necessarily affirms the existence of such power, and hence the well-known axiom that the exception proves the rule.

* * * * *

In addition to this congressional recognition the Supreme Court of the United States has repeatedly adjudged the existence of this power in the President.

If the foregoing quotations and those which are to follow shall seem too extensive and reiterative, our excuse lies in the desire to show clearly, not only that the power of reservation has been implied so often for specific public purposes, but also that it has been repeatedly and customarily exercised with the acquiescence of Congress and that, in the opinion of learned jurists, it is applicable to public purposes in general.

(c) *Authorities sustaining reservations made in aid of proposed legislation.*

By the act of August 8, 1846 (9 Stat., 77), Congress granted to the then Territory of Iowa, to enable it to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork, "one equal moiety, in alternate sections, of the public lands in a strip five miles in width on each side of said river." A doubt very soon arose as to whether or not the grant was intended to extend to

lands lying along the river beyond the fork. Because of this doubt the lands were withdrawn throughout the length of the river, although no reservation whatever was directed by the act itself.

In the case of *Wolcott v. Des Moines Co.* (5 Wall., 681), which arose after this court, in *Dubuque & Pacific R. Co. v. Litchfield* (23 How., 66), had decided that the grant *did not* extend above the fork, the question was presented squarely whether the order of withdrawal, in so far as it affected the lands above the fork, was valid. An act passed in 1856 had granted to the State of Iowa lands to aid in the construction of certain railroads, with a proviso excepting all lands theretofore reserved to the United States by any act of Congress or in other manner *by competent authority* for the purpose of aiding in any object of internal improvement. But for the withdrawal order, the lands affected by the litigation would have passed under this railway grant, and the question was whether the withdrawal constituted a reservation by competent authority within the meaning of the proviso. The court held that it did. In the opinion (p. 688) it is said:

It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines River—first, by the Secretary of the Treasury, when the Land Department was under his super-

vision and control, and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and Cabinet. *Besides, if this power was not competent, which we think it was ever since the establishment of the Land Department and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by Congress for any of these public purposes to a State, notice is given by the Commissioner of the Land Office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of.*

It will be observed that, in the opinion of the court, the power to withdraw existed without regard to the duty implied from the act of 1846 to withdraw the lands *embraced in the grant only.*

In *Riley v. Welles* (decided at the December term, 1869), 154 U. S., 578, the court held that the lands above the fork were not subject to entry under the preemption act of 1841.

In *Williams v. Baker* (17 Wall., 144), and *Homestead Co. v. Valley Railroad* (ib., 153), the grant of 1846 was considered and the previous decisions upholding the withdrawal order were examined and approved. In both of those cases it was held that the lands within the withdrawal did not pass under the railroad grant of 1856.

In *Wolsey v. Chapman* (101 U. S., 755), it was decided that the withdrawal under the act of 1846 operated to prevent the selection of lands to satisfy a grant made to the State of Iowa in 1841 by Congress. We quote from page 768 of the opinion:

It is conceded that the lands in controversy were actually reserved from sale by competent authority when the selection was made under the act of 1841. They were reserved *also* in consequence of the act of 1846. The proper executive department of the Government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry,

and, as we held in *Riley v. Wells*, was sufficient to defeat a settlement for the purpose of preemption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

The decision of this court, holding that the grant did not extend above the fork, was rendered in 1860. Thereupon the State, through her congressional delegation, sought a new grant to overcome the effects of the decision; and, as this court observed in the case next to be considered, "the whole subject was thus laid before Congress." That body first passed a joint resolution, in 1861, providing that the titles still retained by the United States in tracts along the river above the fork, which had been certified to the State improperly by the Land Department, and which were then held by *bona fide* purchasers from the State, be relinquished. This resolution, it will be observed, did not grant to the State any lands which had not previously been selected and certified and actually sold to *bona fide* purchasers. The following year, however, an act was passed which granted such lands also.

In *Bullard v. Railroad Co.* (122 U. S., 167) the plaintiff claimed title by virtue of certain preemption settlements made after the resolution of 1861 but prior to the act of 1862, and the object of his bill was to have the court declare that his title under those settlements was superior to the title which

that act conferred upon the State and her grantees, his contention being that the force of the withdrawal order ended with the joint resolution, so as to leave the lands open to acquisition under the preemption law. The court, however, decided that the order must be deemed effective, even after the resolution, as an authorized act of the Executive withholding the lands from other disposition *until the question whether they should or should not be granted to the State could be determined by Congress*. After pointing out that in 1860 the Commissioner of the General Land Office had notified the local officers that the lands would continue "reserved for the time being from sale or from location by any species of scrip or warrants, notwithstanding the recent decision of the Supreme Court against the claim," in order to afford time for further legislation, the court observed (pp. 173-175):

It will thus be seen that, notwithstanding the decision of the Supreme Court of the United States in the winter of 1860, the land office determined that the reservation of these lands should continue for the purpose of securing the very action by Congress which the State of Iowa was soliciting, and it is not disputed by counsel for the appellant in this case that this was a valid continuation of such reservation and that during its continuance the preemptions under which the plaintiff claims could not have been made. But it is argued that the joint resolution of 1861 terminated this condition

of suspense, and in and of itself ended the withdrawal of these lands which had been established and continued since the controversy originated between the State and the Federal Government as to the extent of the grant. This is the only foundation on which plaintiff's title to the land in controversy in this case rests.

We do not think the joint resolution had the effect to end the reservation of these lands from public entry. Whether we consider the purpose of the original order, its long continuance, and that it has been held, in the face of an act of Congress granting lands for public purposes to the railroads already mentioned, to constitute such a withdrawal as that act excepts from the operations of the grant, and that up to the present time no preemptions or sales have been finally recognized as valid by the department or by the courts, it would be very extraordinary if the joint resolution should have that effect. It does not purport to act upon all the matters which were in controversy between the State and the General Government. It certainly did not act upon all the claims and matters in question then pending before Congress in regard to these lands. It was, indeed, a very limited disposition of a part of the matter *which Congress supposed might then be acted upon with safety without further investigation*. It was simply the recognition of the title which had passed to the grantees of the State of Iowa in regard to the lands which had been certified by the

proper authorities of the General Government to the State under the act of 1846, and which, by the decision in *Dubuque & Pacific Railroad v. Litchfield*, had been held to be unwarranted by the statute.

* * * * *

The broader and larger question of the title to the lands within 5 miles of the Des Moines River, above Raccoon Fork, which had not been certified to the State, and which were declared by the decision of *Dubuque & Pacific Railroad v. Litchfield* not to be included within the grant of 1846, Congress retained for further consideration, and, at its next session after this joint resolution was passed, it completely disposed of the whole subject, so far as it was within its power to do so, by validating the grant of 1846 to the full extent of the construction claimed by the State of Iowa. If the order of the Commissioner of the General Land Office of May 18, 1860, was in force up to the passage of the joint resolution, it is not possible to perceive why it terminated then. It was declared by the commissioner that the order or notice was made to protect these lands from location by any species of scrip or warrant, notwithstanding the decision of the Supreme Court to afford time for Congress to further consider the case.

This is not the way in which a reservation from sale or preemption of public lands is removed. In almost every instance, in which such a reservation is terminated, there has been a proclamation by the President that

the lands are open for entry or sale, and in most instances they have first been offered for sale at public auction. It can not be seen, from anything in the joint resolution, that Congress either considered the controversy ended or intended to remove the reservation instituted by the department. Its immediate procedure at the next session to the full consideration of the whole subject shows that it had not ceased to deal with it, that the reason for this withdrawal or reservation continued as strongly as before, and it can not be doubted that the subject was before Congress, as well as before its committees, and that the act of July 12, 1862, was, for the first time, a conclusion and end of the matter so far as Congress was concerned.

Three propositions were decided in those cases, viz:

1. That it is within the *general* implied power of the Executive to withdraw lands from private entry.

2. That when a grant is made by Congress, the Executive has authority, implied from the duty to execute the grant, to withdraw not only the lands actually granted, but also other lands which, though not intended to be granted, may seem so because of an uncertainty about the proper construction of the granting act, and that such a withdrawal of lands *dehors* the grant will remain effective until the uncertainty has been finally dispelled.

3. That even after it has been finally determined, by the highest judicial authority in the land, that lands thus reserved were never intended to be granted, the Executive has authority to continue to withhold them from settlers and other claimants under the general laws for the sole and express purpose of affording Congress time to determine whether or not it will add those lands to the lands already granted.

Now, passing the first of these propositions, which goes far beyond any contention that we are obliged to make, the specific principle underlying the third is exactly applicable to our case. The authority which it concedes is in no sense an authority implied from a duty to execute an existing law; it is an authority implied from the duty to assist in the effectuation of a law which has not been made but which ought to be and in all probability will be made.

In the case of the Des Moines River grant legislation was proposed which ultimately was passed as anticipated, and if the power of reservation had not existed the purpose of the legislation would have been defeated. The same is true in this case. In that case the pending bills contemplated a disposition of the lands in a way at variance with the ways provided by existing law. So in this case.

Any effort of the defendants to distinguish the Des Moines River cases upon the bare ground that the reservation continued only because it was not

technically revoked must fail. A perusal of the opinions brings conviction that, in the judgment of this court, the reservation remained effective, even after the scope of the original grant had been settled, not because no formal action had been taken by Congress or the Executive to revoke it, but because the *purpose* for which it was retained had not been completely satisfied. This presupposes a continuing lawful purpose. Clearly, if it was not lawful for the Executive, by positive action, to make a new reservation for the purpose of aiding the anticipated legislation, the Executive was powerless to achieve the same (unlawful) result merely by refusing to declare the revocation of a reservation made for another purpose, and whose *raison d'être*, in the eye of the law, had ceased to exist. The rule that a reservation once made persists until revoked by the power that created it has no application in a case where, by hypothesis, the authority to create and the lawful reasons for continuance have both come to an end. In such a case the status of the land could not be made to depend upon the intention of the creating agency. Consequently, it would be immaterial what that intention was respecting the continuance of the reservation or how it was expressed. In other words, more concretely, the Executive, its authority to reserve lands being dependent on the existence of certain facts, could not, by inaction any more than by action, withhold them from the public-land laws

when those facts were no longer present and when all legitimate reason for a reservation was gone.

In the Des Moines River cases, moreover, there were really *two* reservations based upon two different purposes. After the act of 1846 had ceased to afford an excuse for the reservation as originally made, the Land Department continued it *expressly* for a new purpose—to aid the proposed legislation.

In the *Bullard case*, the Supreme Court did refer to the fact that there had been no formal revocation by the President. But the court will see that this fact was adduced as evidence that the *purpose* of the reservation had not been fully accomplished. It had been argued that the passage of the resolution of 1861 fulfilled the purpose and impliedly revoked the reservation, but the court held that the resolution constituted but a part of the expected legislation and that “the *reason* for this withdrawal or reservation continued as strongly” after the resolution “as before,” and did not cease until Congress had legislated fully and finally by the act of 1862.

3. *Further discussion of the Executive practice and legislative recognition.*

[When not contained or mentioned in the printed publications cited, the Executive orders described below will be evidenced by certified copies.]

Reservations by the Executive for the purposes of military and Indian occupancy have been numerous and extensive. For many years it has been the practice to establish them when necessary, irre-

spective of the existence of statutory authority.¹ Such reservations have also been made for the purpose of supplying fuel and building and other materials for the use of military posts. Thus, by an order of April 6, 1859, President Buchanan, at the request of the Secretary of War, reserved from sale 100 acres of land, near Fort Bridges, Utah, including certain coal mines, for military purposes. In March, 1867, President Johnson, upon like request, reserved land for wood supply at Fort Wads-

¹The procedure adopted in such cases is given in the authoritative public document entitled "The Public Domain" (published in pursuance of acts of Congress in 1884), pp. 243-248. That work also gives schedules of Indian reservations then existing, showing acreages, localities, and manner of creation, whether by treaty, statute, or Executive order. *Ib.*, 727, 1252. See also vol. 1 of Kappler's *Laws and Treaties* (S. Doc. 452, 57th Cong., 1st sess.), where at pp. 801 to 936 all Executive orders creating Indian reservations, from the organization of the Government to the year 1903, are published in full. Also "The Public Domain," pp. 250, 748, 1258, and the companion publication "Laws of the United States of a Local and Temporary Character," vol. 2, pp. 1171 to 1183, concerning military reservations. Lists of existing Indian and military reservations, showing the manner of their establishment, are found also in reports of the Commissioner of the General Land Office and of the Commissioner of Indian Affairs accompanying the annual reports of the Secretary of the Interior to Congress. There is no publication which can be relied on in determining whether a given Executive order was preceded by statutory authority. Slight investigation, however, is required to demonstrate that authority was absent in numerous cases, in many of which the reservations were subsequently dealt with as legitimate by acts of Congress, cited in the documents above referred to.

worth, Dakota Territory. Two other wood and timber reservations, for the use of Fort Robinson, in Nebraska, and Forts Sanders and D. A. Russell, and Cheyenne Depot, in Wyoming, were created by President Hayes, November 4, 1879, and the latter was enlarged by him February 25, 1880. On March 26, 1881, President Garfield extended the Fort Wingate Reservation in New Mexico (originally declared, with an area of 100 square miles, by an Executive order of 1870), the purpose of the extension being to supply the post with timber for necessary building materials, etc.¹ November 21, 1902, President Roosevelt reserved land to secure a deposit of clay for making roads on a military reservation in Alaska; and, November 25, 1905, upon the recommendation of the Secretary of War, he reserved lands on Chilkat Inlet for the purpose of supplying water to Fort Seward. Other similar instances will be found mentioned in the annual reports of the Interior Department.

¹An act of 1853 (10 Stat., 238) authorized the President "to make five reservations * * * in the State of California or the Territories of Utah and New Mexico bordering on said State, for *Indian purposes*." The reservations were to contain not more than 25,000 acres each, and Indians in *California* were to be removed to them. This has been referred to by defendants as authorizing the Fort Bridges and Wingate Reservations, *supra*. Defendants also explained the Dakota and Wyoming Reservations by reference to an appropriation made in 1855 (10 Stat., 608) of ten thousand dollars "for the *establishment of military posts*" in Kansas and Nebraska.

On September 1, 1837, the Secretary of the Treasury, at the request of the Secretary of War, directed the Commissioner of the General Land Office to cause certain lands at Sturgeon Bay, Wis., "to be reserved from sale according to law." The object was to conserve a supply of building stone for harbor improvements. The reservation is still intact.

On March 22, 1880, President Hayes reserved a large body of public land in Wisconsin and Minnesota for reservoir purposes. Congress, by an appropriation act of June 18, 1878 (20 Stat., 152, 162), had directed the Secretary of War to cause an examination to be made of the sources of the Mississippi River and certain other rivers in those States, in order to determine the practicability and cost of creating and maintaining reservoirs for the purpose of improving their navigation. The Secretary was also directed to make an estimate of the damage that would result to property of any kind. Later the Secretary made his report and recommendations to Congress, and the withdrawal was made without any antecedent congressional authority, but in aid of that report and in the anticipation that the lands withdrawn "will be affected in the event of affirmative congressional action upon said report."

A withdrawal of additional lands in the States mentioned was made by President Arthur, February 20, 1882, for the same purpose, but *after* appropriations for the construction of the reservoirs had

been made by the act of June 14, 1880 (21 Stat., 180). By the act of June 20, 1890 (26 Stat., 169), Congress authorized the President to restore the withdrawn lands to entry under the homestead laws. Section 2 of that act provided that, if any of the lands had been disposed of by proper officers of the United States under color of the public land laws, and the consideration received therefor was retained by the Government, the title of the purchasers might be confirmed by the Secretary of the Interior, etc.

Withdrawals have been made extensively, during many years, for a variety of purposes not above mentioned, as to correct surveys; to avoid conflicts with private claims; to *prevent frauds*; to ascertain character of land, etc. See the letter of the Acting Secretary of the Interior, of March 3, 1902, in response to a Senate resolution calling for information as to "what, if any, of the public lands have been withdrawn from disposition under the settlement or other laws by order of the Commissioner of the General Land Office, and what, if any, authority of law exists for such order of withdrawal" (S. Doc. No. 232, 57th Cong., 1st sess.) and see the argument of the commissioner in defense of the practice, and the lengthy schedule of withdrawals attached to the Secretary's letter.

The reports of the Secretary of the Interior and Commissioner of the General Land Office for the years 1900, pages LI, 75, and 1901, pages LXIII,

87, show that the department withdrew from agricultural entry 78 townships of supposed oil land in California in aid of an investigation of its character and to prevent the unlawful application of lieu selections, etc., and that the fact was made known to Congress. Congress was also aware that nearly 70,000,000 acres of coal land were withdrawn in the years 1906-7 to verify the existence of coal deposits, the reason being that serious frauds had been perpetrated. (Rep. Sec. Int., 1907, p. 13, *id.* Comm'r G. L. O., p. 251.) In 1896 and 1899 orders were made temporarily reserving the "Pet-rified Forest" in Arizona for a proposed national park. These also were reported to Congress. (Rep. Comm'r G. L. O., 1900, p. 87.) The land including the Wind Cave in South Dakota, which was made a national park by the act of January 9, 1903 (32 Stat., 765), was first reserved by the Executive in 1900, without statutory authority, but in the expectation that Congress would act, as it did. (Commissioner's Report, 1900, p. 91.) By the Commissioner's report for 1902 (p. 319) Congress was apprised of temporary reservations made for the purpose of creating State parks in California and Michigan.

Prior to June 28, 1906, the President had created six reservations for the protection of birds. (Rep. Sec. Int. 1909, p. 43.) On that date Congress passed a statute making it an offense to take or interfere with birds, or their eggs, "on any lands

of the United States which have been set apart or reserved as breeding grounds for birds by any law, proclamation, or Executive order," etc. (34 Stat., 536.) The fact of the prior reservations had been called to the attention of Congress, and this is one of very numerous instances in which the action of Congress evinces its approval of the executive practice.

September 26 and November 4, 1905 (34 L. D., 245), the Secretary of the Interior directed that all applications to enter, select, purchase, or locate isolated and disconnected tracts embracing less than 40 acres, presented after November 15, 1905, should be received and suspended without further action. This suspension was made with the view to submitting to Congress the advisability of making provision for the disposition of such tracts other than that provided by the laws then in force. The result of the suspension and the subsequent recommendation of the department was the act of Congress approved June 27, 1906 (34 Stat., 517), providing a method for the disposition of isolated and disconnected tracts.

June 22, 1906, the President withdrew a large area in Wisconsin, in aid of a bill authorizing that State to select certain lands. The bill was subsequently passed. (See 35 L. D., 11; 34 Stat., 517.)

The act of April 28, 1904 (33 Stat., 525), conferred upon qualified persons the right to purchase coal lands in Alaska at a fixed price of \$10 per acre.

November 12, 1906, all coal lands in Alaska were withdrawn from entry by direction of the President. (35 L. D., 572.) By the act of May 28, 1908 (35 Stat., 424), the propriety of this action was distinctly recognized. That act made provisions in favor of persons who had in good faith made locations of Alaskan coal lands *prior to November 12, 1906*.

General recognitions of the Executive authority like those contained in the preemption acts cited in *Grisar v. McDowell*, *supra*, are found in a number of other statutes. Among these may be mentioned the town-site law of March 2, 1867 (14 Stat., 541), where the following proviso appears:

That the provisions of this act shall not apply to military or other reservations heretofore made by the United States nor to reservations for lighthouses, customhouses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the Land Office by title derived from the Crown of Spain or otherwise.

And the general allotment act of February 8, 1887 (24 Stat., 388, sec. 1), which provides:

That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or *Executive order*

the President may allot the land, etc.

The references and citations which we have given are illustrative merely, but an endeavor to render them complete would add to our brief enormously without serving any useful purpose. While it is possible that antecedent statutory authority, which we have overlooked, existed in some of the cases mentioned, it is certain beyond peradventure that the practice of reserving lands for public purposes without such authority, originating at an early day, has been constantly and increasingly exercised, has been perfectly well known to Congress from the beginning, has never been objected to, but has been recognized by Congress again and again as a practice wholesome and necessary to the welfare of the Government and not a practice of usurpation.

Much reliance has been placed by defendants upon the fact that Congress, in many instances, has affirmatively directed or authorized the making of reservations for purposes designated.

There is nothing in these affirmative statutes, however, which is repugnant to the existence of the President's implied authority. Congress has a habit of making special provisions that are covered by existing legislation. Witness, for example, the numerous unnecessary declarations that this or that act shall constitute perjury. It is often not aware of its own past enactments, or not certain of their legal effects, so that it covers the ground again out of abundant caution. Furthermore, there is no spe-

cial reason why Congress should think about this general implied authority of the President when it makes up its mind that specific reservations or reservations of a certain kind are or may be needed. Its own power over the subject is plenary, and its wish need but be expressed to be effective. When Congress directs or authorizes the President to make such reservations, it does not do so for the sake of conferring a new power or privilege upon him, it does so because it believes those particular reservations will be needed; its mind is on them rather than the ways of making them. It will be noticed that a majority of these special statutes are mandatory in form. Nearly all of them may properly be regarded as mandatory in substance—as declarations of an opinion or policy that specific reservations, or reservations of a certain character, should be created. Hence they are in the nature of commands to the President. Statutes of this kind are, indeed, more of a help than a hindrance to our case. They show a habit or policy of reserving lands for public needs.

In *United States v. Bailey* (9 Pet., 238) it was decided that the Secretary of the Treasury, being empowered by statute to pass upon certain claims, was authorized to require proof by affidavit, and that false matter in such an affidavit was perjury. *There was no statutory authority for the affidavit.* But, in sustaining the Secretary's implied authority to exact it, the court relied very largely on the prac-

tice to do so and on the fact that Congress had granted such authority *in other* cases. We quote from the opinion (p. 254) :

It is certain, that the laws of the United States have, in various cases of a similar nature, from the earliest existence of the Government down to the present time, required the proof of claims against the Government to be by affidavit. In some of these laws, authority has been given to judicial officers of the United States to administer the oaths for this purpose; and at least as early as 1818 a similar authority was confided to State magistrates. The citations from the laws, made at the argument, are direct to this point and establish in the clearest manner *a habit of legislation* to this effect. It may be added that it has been stated by the Attorney General, and is of public notoriety, that there has been a constant practice and usage in the Treasury Department, in claims against the United States, and especially of a nature like the present, to require evidence by affidavits, in support of the claim, whether the same has been expressly required by statute or not; and that, occasionally, general regulations have been adopted in the Treasury Department for this purpose. Congress must be presumed to have legislated under this known state of the laws and usage of the Treasury Department. The very circumstance, that the Treasury Department had, for a long period, required solemn verifica-

tions of claims against the United States, under oath, as an appropriate means to secure the Government against frauds, without objection, is decisive to show that it was not deemed a usurpation of authority.

In *Robertson v. Downing* (127 U. S., 607, 613) the court said:

This construction of the department has been followed for many years, *without any attempt of Congress to change it*, and without any attempt, as far as we are advised, of any other department of the Government to question its correctness, except in the present instance. The regulation of a department of the Government is not of course to control the construction of an act of Congress when its meaning is plain. But when there has been a *long acquiescence* in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.

The important facts are that the President has exercised the implied authority persistently and increasingly, and that, so far as appears, *Congress has never to this day repudiated his action in a single instance, but, on the contrary, has repeatedly recognized it as legitimate*. These repeated acts of Congress have not operated merely to ratify particular acts of the President, as the defendants suppose; they have operated to confirm the Executive *practice*; their result is to confer a continuing

authority (if it did not exist independently). Tested by the general principles of agency, as applicable to private individuals and corporations, the authority would not be open to question.

United States Bank v. Dandridge (12 Wheat., 64, 70).

Colorado Springs Co. v. American Pub. Co. (C. C. A., 8th Cir.) (97 Fed., 843, 851).

The cases which we have already cited suffice to show that the legislative consent may be inferred from the indirect approval or even the mere acquiescence of Congress. See, also, *Wells v. Nickles* (104 U. S., 444, 447).

In *United States v. Macdaniel* (7 Pet., 1), where the authority of the Secretary of the Navy to employ and pay a clerk in his department was sustained, although there was no statute permitting such an employment, the court said (p. 14):

It is insisted, that as there was no law which authorized the appointment of the defendant, his services can constitute no legal claim for compensation, though it might authorize the equitable interposition of the legislature. That usage, without law or against law, can never lay the foundation of a legal claim, and none other can be set off against a demand by the Government. A practical knowledge of the action of any one of the great departments of the Government, must convince every person, that the head of a department, in the distribution of

its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow, that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government. Hence, of necessity, usages have been established in every department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage can not alter the law, *but it is evidence of the construction given to it*; and must be considered binding on past transactions.

All that is necessary to confer the authority to make reservations is *the consent of Congress*.

That consent may be manifested *without an express statutory declaration of it*.

It *has been* manifested by the long, consistent executive and legislative practice exhibited in the preceding pages.

4. *Inapplicability of certain authorities relied on by the defendants.*

Of the numerous cases cited by the defendants in the court below not one can be said to deny the authority for which we contend.

In *United States v. Fitzgerald* (15 Pet., 405, 420), it appears that the land was actually entered under the preemption law by Fitzgerald before an effort was made to reserve it by the Secretary of the Treasury. The court said:

It can not be pretended, that the land in controversy was reserved from sale by any act of Congress, *or by order of the President*, unless the direction of the Secretary of the Treasury to reserve it from sale, several months *after* it had been actually sold and paid for, could amount to such an order.

The court also held that the mere occupancy by Fitzgerald, who happened to be a subordinate officer of the customs, could not amount to a public appropriation of the land. This case is fully explained in *Scott v. Carew* (196 U. S., p. 112).

United States v. Copper Company (196 U. S., 207); *United States v. George* (228 U. S., 14, 20); and similar cases, declare simply that the departments, under guise of making regulations to execute a law, can not add to or take from the requirements of the law itself and thus defeat its purpose.

The decisions upon which the defendants have chiefly relied concerned withdrawals made in supposed pursuance of certain acts granting lands in

aid of railways. We refer to the decisions of Secretary Lamar in the case of the *Atlantic & Pacific Railroad* (6 L. D., 84, 87); of Secretary Vilas in the case of *Northern Pacific Railroad v. Miller* (7 L. D., 100, 112); of Secretary Smith in *Northern Pacific Railroad v. Davis* (19 L. D., 87, 88), and decisions of this court in *Hewitt v. Schultz* (180 U. S., 139), *Nelson v. Northern Pacific Railroad* (188 U. S., 108), *Brandon v. Ard* (211 U. S., 11), and a number of other cases of like character.

These authorities, properly understood, have no bearing upon the present case.

The withdrawals there in question were made for the purpose of giving to the railway grantees a preference in certain lands, and were made upon the theory that the granting acts so intended. It was found that there was no such intention in the acts, but that, on the contrary, they expressed an intention, affirmatively, to leave the lands open to acquisition under other laws. Thus the withdrawals would have operated to take the lands from one claimant and give them to another, in violation of the expressed will of Congress. The withdrawals, therefore, were based entirely upon a mistake of law. Their sole object was to carry out the granting acts, but their real, legal effect was to defeat those acts and the other land laws involved. *Brandon v. Ard*, for instance, holds that it was not the intention of the granting act to reserve for the railway any right to specific land, until its line

of route was fixed and approved, and that it was the intention to allow homesteaders and other claimants free play before that time arrived. Consequently the premature withdrawal tended not to aid but to contravene the law.

We do not contend that the Executive has any implied or inherent power to *dispose* of public lands, much less that he may withhold them from settlement for the purpose of conveying them to a railway corporation in defiance of the will of Congress.

The general result of the decisions on railway grant withdrawals has been well expressed by the court below in another case:

From the time of the earliest railroad land grants it was the practice of the chief officers of the Land Department, to whom was committed the administration of such grants, to withdraw from settlement, entry, and sale the public lands along the line or route of the road so aided, in advance of its definite location, in order that the lands might be preserved for the ultimate satisfaction of the grant. Such withdrawals, where not made in opposition to the terms of the grant or other congressional enactment, have been uniformly declared to be reservations made by competent authority and to be efficient to remove the lands therein from the category of public land and to exclude them from subsequent railroad land grants containing no clear declaration of an intention

to include them; and this, even though it subsequently transpired that the withdrawal was ill advised, or that the lands therein were not required for the satisfaction of the grant.

Northern Lumber Co. v. O'Brien, 139 Fed., 614, 617.

In *Leecy v. United States* (190 Fed., 289) it was held that the Secretary of the Interior could not withhold timberlands in the White Earth Indian Reservation for the benefit of certain Indians, and refuse to allot them to others who, by the Nelson Act of 1889, the agreement made under it, and the Steenerson Act of 1904, were entitled to allotments. That legislation made all the land of the reservation allottable, in effect directing that it be divided among all the Indians, and there was no legislation which gave any preference to the Indians for whom the Secretary was seeking to use the timber. The attempt was not to reserve public land for public purposes, but to devote what was in essence private land to one set of co-owners to the exclusion of others, contrary, as the court held, to the intention of Congress.

Lockhart v. Johnson (181 U. S., 516, 520) decided that the mere existence *sub judice* of a private claim based on a Spanish grant will not prevent locations under the public-land laws. Not even remotely was the implied power of the President involved.

Defendants have also quoted excerpts from an opinion by Attorney General Knox (23 Op., 589).

It was there held that the Secretary of the Interior had no implied authority to prohibit hunting on national forests for the sake of protecting game. The opinion notices that not only was there no law "or usage" to support such a regulation, but that it had always been the "long settled policy of the Government in favor of the people" to allow free access to the public lands for the purpose of hunting, trapping, and fishing. The gist of the opinion is in the following extract (p. 591):

While the management and control of the public lands, except as otherwise provided by law, is committed to the Secretary of the Interior, this, even to the extent committed to him, is not absolute, but is a management and control subordinate to and for the purposes and objects intended, as expressed by law *or settled usage or practice*. He is but the agent of the Government for carrying out its purposes, and the rules and regulations which he makes can be such only as have relation to and subserve those purposes. He can not permit that which the law or the settled policy of the Government forbids, nor can he forbid what is thus permitted.

Those who would defeat this withdrawal have made much of a doubt which was expressed by President Taft in his message of January 14, 1910:

The present statutes, except so far as they dispose of the precious metals and the purely agricultural lands, are not adapted to carry out the modern view of the best disposition

of public lands to private ownership, under conditions offering on the one hand sufficient inducement to private capital to take them over for proper development, with restrictive conditions on the other which shall secure to the public that character of control which will prevent a monopoly or misuse of the lands or their products. The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statutes would be detrimental to the public interest, is not clear or satisfactory. This power has been exercised in the interest of the public, with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions.

It is well known that the existence of a general authority in the President to withdraw lands had been seriously questioned by many who were in favor of allowing free and unrestricted privileges in the public domain, and that this view was shared, to some extent at least, by high officials in the Interior Department. As we have seen, the Public Lands Committee of the Senate came to a different conclusion. But, without attempting to speculate as to how far Mr. Taft's uncertainty was the result of his independent researches, it seems enough to observe concerning it, that it was but an uncertainty, not a conviction; that it was properly resolved in favor of the public; and that, so far as we know, it did ^{not} relate to a withdrawal made under the

circumstances and for the purposes attending this withdrawal of oil land.

II.

In the absence of any congressional inhibition, the President, of national necessity and by the very nature of his functions under the Constitution, is impliedly authorized to reserve public land for public purposes.

1. *This authority is subordinate to the power of Congress.*

It may here be observed, once for all, that the plenary power of Congress to determine whether reservations shall or shall not be made is conceded. Whatever authority the President may have in that regard, whether conferred by statute or derived by implication, may be taken away from him by an act of Congress. Throughout our argument we recognize this as axiomatic.

2. *The authority involves no conflict with the general land laws.*

These laws are in essence mere offers whereby any qualified person, by performing certain conditions, may select and acquire particular parcels out of the great mass of public lands. They are not to be construed as dedicating the entire public domain as a bounty to the prospective beneficiaries. No individual can acquire any right until he has connected himself with some specific tract. Except as this is done, the lands remain the property of

the Government, and as fully subject to its use or disposition as though the general laws had never existed.

A reservation by the President is an appropriation of the specific tracts affected to the purpose for which the reservation is made. No individual who has not previously connected himself with the land thus appropriated can have a standing to complain of the reservation, unless he can show, first, that he himself has the qualifications and has performed the conditions required by a general law, and, secondly, that the President was not competent to make the appropriation for the ends in view. The first he may establish by invoking the general law, but the second he may not establish in that way, since such laws work no change in the status of the land itself, as vacant public land, on the one hand, nor do they contain terms which either expressly or by implication limit the power of public appropriation, on the other. Indeed, as we shall show conclusively under our third general proposition, it would be wholly unpermissible to construe such a law as abridging such a power.

In this case the defendants invoke the mining law, in the first place, to establish their status as qualified claimants, which is, of course, logical and necessary. But in the second place, they advance it as a negation of the President's authority. In this there is serious error and confusion. The mining law can have no legitimate bearing upon

the validity of the President's act, except in so far as it may be truthfully said that his purpose was to defeat the purpose of the mining law. But such, as we have seen, is not the fact. His immediate purpose was to insure an adequate oil supply for a very important public use. This purpose was entirely consistent with the mining law. It affected, and therefore alone suffices to sustain, the entire reservation. It was to be accomplished either by a definite segregation of lands, sufficient in quantity and quality, or through the medium of exceptions and conditions to be imposed in the disposition of oil or oil lands to private interests, or in both of these ways, as Congress might determine. Of course the means are no concern of the defendants if they may not challenge the purpose. Even if it were true that the purpose, and the sole purpose, was to afford Congress opportunity to prevent immediate and irreparable waste, it would not follow that the reservation was at war with the purpose of the mining act. The conditions upon which the President acted and the results which he sought to avoid were such as could not have been anticipated by Congress when it offered these lands to the public.

3. Reservations for public purposes may be demanded as a duty to the Nation.

When the United States owns land which, either by reason of its location or its character, is suited to supply a national necessity, it seems super-

fluous to suggest that, in the absence of other controlling considerations, the land should be devoted to the necessity. Particularly is this true when the need for the land is in some sense vital and doubts exist whether, if the land were lost, a substitute could be found by purchase or otherwise. Throughout the history of this country it has been customary for Congress to devote public lands to public uses whenever they were suitable, and the President has been constantly availing himself of them in the performance of his duties.

It may therefore be safely assumed as a national policy, that, primarily, the public lands are devoted to national needs, and that this policy is paramount over any which looks to their sale or donation to individuals. Of course, Congress, in the plenitude of its power, *could* adopt and enforce a different policy—even the policy of a spendthrift; but this is not to be presumed in the absence of clear evidence of an intention to do it. The enactment of a general law permitting purchase by individual is no evidence of a policy to sell regardless of direct public needs.

4. *The duty to make reservations for public purposes is one which necessarily must be delegated to the President for its efficient performance in emergencies.*

Oddly enough, the necessity for Executive action to insure promptness in emergencies was questioned in the court below, counsel gravely asserting that Congress should be appealed to and that Con-

gress would act promptly if it thought prompt action necessary. The difficulty with this is that it contradicts all experience. Legislative bodies sometimes act quickly, but more frequently their proceedings are subject to tedious obstructions and delays. This procrastination, and the public notoriety which attends their deliberations, unfit such bodies for the performance of those acts of government which demand celerity, and for those also which demand secrecy in preparation. This truth, well understood by all, played an important part in the division of powers when the Constitution was formed, and is well stated by Justice Story in his work on constitutional law. He places the slowness of the processes of Congress among the reasons for not giving it control of the Army and Navy (*loc. cit.*, sec. 1491) and, treating of the reasons for lodging the pardoning power with the President, observes:

A still more satisfactory reason is, that the legislature is not always in session, and that their proceedings must be necessarily slow, and are generally not completed until after long delays. (*Ib.*, sec. 1500.)

So of the making of treaties:

The House or the Senate, if in session, could not act until after great delays, and in the recess could not act at all. (*Ib.*, sec. 1511.)

See also *Ohio Life Ins., &c., Co. v. Debolt*, 16 How., 416, 435.

If proof of so plain a proposition were needed, it would be found in the case of these oil lands in Wyoming and California. Though the lands were withdrawn by the President in September, 1909, and though the vast importance of retaining them was well known before that time, and was brought out clearly before Congress soon afterwards by presidential messages and widespread public discussion, it was not until late in June of the following year that legislation occurred. In the meantime the predecessors of these defendants, and hordes of other persons, hoping that the order might be adjudged technically void, entered upon the lands reserved and went through the forms of location.

In view of the vast extent and diversified character of the public domain, and in view of the great variety of the public uses of which it is susceptible, it is evident that Congress can not provide in advance specifically all the measures that may be necessary to protect the lands and insure their proper devotion to the public interest in every possible contingency. Contingencies which Congress did not and could not foresee are certain to arise from time to time, requiring that something be done immediately to protect some part of this great property from waste or other injury, or demanding that some portion of it be used for an important public purpose, or be preserved for such use in the future. To say that the possibility of safeguarding

the public interests depends in every such case upon whether, perchance, a statute already exists to fit the situation is to say that our system of government is defective, since it leaves the Nation without adequate protection in serious emergencies. If the President were obliged to request antecedent authority of Congress, the delay would be so great that lands of the utmost importance for public uses would pass into private ownership. Indeed, the very introduction of the bill might call attention to them and insure their loss.

5. The duty to act in case of necessity devolves upon the President as a part of his constitutional responsibility.

It has been customary to connect this authority with the consent of Congress as manifested in legislation, or as implied from tacit acquiescence in repeated assumptions of the authority. But, while the authority could not exist against the will of Congress, express or implied, it is not at all necessary to stake its existence upon the conception of authority actually delegated by Congress. It is entirely logical to infer the power out of the Constitution, from the very necessity for its existence and from the functions of the President in our Government.

The public lands are property of immense importance to the Nation. They are constantly demanding protection against trespass, spoliation, and fire. Protection implies action, and action can

only come from the Executive. If Congress has not empowered him to act by a statute, he must act in emergencies without one. This is a proposition which no one, however rash, would venture to deny.

But the concession of so much absolutely requires the concession of more. This property is not merely held to give away or sell. Portions of it are of incalculable value for governmental uses. The uses may be immediate and pressing, or they may be certain to arise in the future. They may require the appropriation of lands of a particular character, or lands located at particular places, to such an extent that loss of the lands may work irreparable public injury. Now, in such cases, the duty of those who represent the Government is plain. The lands should be devoted to the public needs, and whatever is necessary to that end should be done in the right way and at the right time. Of course, it may be argued that as Congress is the judge of what is expedient for the welfare of this country in the use or disposition of the public lands, and as Congress may decide that it is wiser to give them away, however imperative in fact may be their retention and use by the Government, no one is authorized to know that a public need exists until Congress has said so. But we pass this thought as offensive to common sense, and in the belief that it is too absurd to figure for a moment in an honest effort to ascertain the self-protecting powers of an

efficient government. In the circumstances supposed (and they could not better be realized than by the circumstances of the present case), it must be conclusively presumed that Congress, if given time to act, would decide wisely and reserve the lands.

The authority of the President to act in such emergencies, by protecting the lands from injury on the one hand or appropriating them for public uses on the other, must be held to exist, first, because, as we have shown, it is only thus that the public interests may be protected; secondly, because, as we shall show, his action implies not the slightest invasion of the province of Congress; and, thirdly, because such action is in entire harmony with and is, indeed, compelled by the general duties and responsibilities of the President. Reserving the second of these propositions for separate treatment, we will now elaborate the third.

Ours is a self-sufficient Government within its sphere. (*Ex parte Siebold*, 100 U. S., 371, 395; *in re Debs*, 158 U. S., 564, 578.) "Its means are adequate to its ends" (*McCulloch v. Maryland*, 4 Wheat., 316, 424), and it is rational to assume that its active forces will be found equal in most things to the emergencies that confront it. While perfect flexibility is not to be expected in a Government of divided powers, and while division of power is one of the principal features of the Constitution, it is the plain duty of those who are called upon to draw

the dividing lines to ascertain the essential, recognize the practical, and avoid a slavish formalism which can only serve to ossify the Government and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking power may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Congress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no sense is he the agent of Congress. He obeys and executes the laws of Congress,

not because Congress is enthroned in authority over him, but because the Constitution directs him to do so.

Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts. We are able, however, to present a number of apposite cases which were subjected to judicial inquiry.

In an opinion rendered by Solicitor General Richards, as Acting Attorney General, on January 18, 1898 (22 Op. 13, 25), it was held that the President was empowered, in the absence of any legislation on the subject, to prevent the landing on our shores of a foreign cable, and to forbid or supervise its operation, if it were landed. The following excerpt will show the reasoning which led to this conclusion:

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to

the President. The Constitution, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the Commander in Chief of the Army and Navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this Nation over its own territory and its international rights and obligations as a distinct sovereignty, the President is not limited to the enforcement of specific acts of Congress. He takes a solemn oath to faithfully execute the office of President, and to preserve, protect, and defend the Constitution of the United States. To do this he must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created. (Mr. Justice Miller, *In re Neagle*, 135 U. S., 1, 63, 64; Mr. Justice Field, *The Chinese Exclusion case*, 130 U. S., 581, 606; Mr. Justice Gray, *Fong Yue Ting v. United States*, 149 U. S., 698, 711; Mr. Justice Brewer, *In re Debs*, 158 U. S., 564, 582.)

The President has charge of our relations with foreign powers. It is his duty to see that in the exchange of comities among na-

tions we get as much as we give. He ought not to stand by and permit a cable to land on our shores under a concession from a foreign power which does not permit our cables to land on its shores and enjoy *there* facilities equal to those accorded its cable *here*. For this reason President Grant insisted on the first point in his message of 1875.

The President is not only the head of the Diplomatic Service, but Commander in Chief of the Army and Navy. A submarine cable is of inestimable service to the Government in communicating with its officers in the Diplomatic and Consular Service, and in the Army and Navy when abroad. The President should, therefore, demand that the Government have precedence in the use of the line, and this was done by President Grant in the third point of his message.

Treating a cable simply as an instrument of commerce, it is the duty of the President, pending legislation by Congress, to impose such restrictions as will forbid unjust discriminations, prevent monopolies, promote competition, and secure reasonable rates. These were the objects of the second and fourth points in President Grant's message.

The Executive permission to land a cable is, of course, subject to subsequent congressional action. The President's authority to control the landing of a foreign cable does not flow from his right to permit it in the sense of granting a franchise, but from his power to prohibit it should he deem it an

encroachment on our rights or prejudicial to our interests.

See also 29 Op., 579, 583.

In *United States v. La Compagnie Francaise des Cables Telegraphiques* (77 Fed., 495, 496) Judge Lacombe expressed the same opinion:

It is thought that the main proposition advanced by complainant's counsel is a sound one, and that, without the consent of the General Government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, which, in the absence of congressional action, would seem to fall within the province of the Executive to decide. As was intimated upon the argument, it is further thought that the Executive may effectually enforce its decision without the aid of the courts. * * *

In the case of *In re Debs* (158 U. S., 564, 582) it was said:

The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers *and the security of all rights entrusted by the Constitution to its care.*

In that case the right involved was the right to have the post roads and the avenues of interstate commerce unobstructed by mob violence, and the

question was whether the Executive could invoke, and the courts exercise, the judicial power of injunction to protect this right. Not only was the power upheld, but the opinion also expressly concedes that the President might have resorted to military force to accomplish the same end. There was no statute purporting to authorize the President to employ armed force or to bring the suit. The authority to do these things was implied. From what? Not from any act of Congress, but from the necessity for safeguarding the national rights. An act of Congress might have been appropriate, but, in its absence, the executive and judicial powers were adequate.

The reasonableness and necessity of implying an authority in the Executive to deal with a subject within the legislative jurisdiction of Congress, but not covered by its enactments, were strikingly upheld in the celebrated case of *In re Neagle* (135 U. S., 1). The assignment of Neagle to guard the person and life of Justice Field was *without statutory authority*. He sued out his writ of *habeas corpus* upon the ground that he was being held in custody for an act done "in pursuance of a law of the United States" within the meaning of section 753 of the Revised Statutes. This court held that, in the absence of any act of Congress governing the subject, it was the duty of the President to afford suitable protection to the judges of the Federal courts while in the discharge of their duties;

that Justice Field was in the discharge of his duty as justice when the assault occurred, and that Neagle, by reason of his assignment by the Attorney General, was then and there under a duty to protect the justice, which might properly be regarded as a duty imposed upon him by "a law of the United States," as those words were used in the *habeas corpus* act. The opinion throughout is intensely interesting and instructive. We quote the following passages which strike us as particularly *apropos* to the present case. After remarking that the judicial department of the Government is impotent to protect itself, the court continued (p. 63):

The legislative branch of the Government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the Government, we find a very different condition of affairs. The Constitution, section 3, Article II, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be Commander in Chief of the Army and Navy of the United States. The

duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called Cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution?

The court next refers to a noted case in which the President brought about the release of one Martin Koszta, a native of Hungary, who had declared his intention to become an American citizen and had been seized by the authorities of Austria; and after observing that the President's action met with the approval of the country and of Congress, inquires "upon what act of Congress then existing can any one lay his finger in support of the action of our

Government in this matter? " It then proceeds (p. 65 *et seq.*) :

So, if the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the Army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place

guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells v. Nickles* (104 U. S., 444). That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the Government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful." But the court, *notwithstanding there was no special statute for it*, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the Government, *had gradually come to assert the right* to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. *And the*

court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of *United States v. San Jacinto Tin Company* (125 U. S., 273, 279, 280). In that case, a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the Government by fraud and deceit practiced upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the Attorney General or any other officer of the Government to institute such a suit in the absence of any act of Congress authorizing it. *It was conceded that there was no express authority given to the Attorney General to institute that particular suit, or any suit of that class.* The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this court to that suggestion conceded that in the acts of Congress establishing the Department of Justice and defining the duties of the Attorney General there was no such express authority, and it was said that there was also no express authority to him to bring suits against debtors of the Government upon bonds, or to begin criminal prosecutions, or to institute criminal pro-

ceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said: "If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. *That such a power should exist somewhere*, and that the United States should not be more helpless in relieving itself of frauds, impostures, and deceptions, than the private individual, is hardly open to argument. * * * There must, then, be an officer or officers of the Government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it can not bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a

special act of Congress in each case, or without some special authority applicable to this class of cases? ” The same question was raised in the earlier case of *United States v. Hughes* (11 How., 552), and decided the same way.

We can not doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection.

As we understand the doctrine of the *Neagle case*, and the cases therein cited, it is clearly this: The Executive is authorized to exert *the power of the United States* when he finds this necessary for the protection of the agencies, the instrumentalities, or the property of the Government. This does not mean an authority to disregard the wishes of Congress on the subject, when that subject lies within its control and when those wishes have been expressed, and it certainly does not involve the slightest semblance of a power to legislate, much less to “suspend ” legislation already passed by Congress. It involves the performance of specific acts, not of a legislative but purely of an executive character—acts which are not in themselves laws, but which

presuppose a "law" authorizing him to perform them. This law is not expressed, either in the Constitution or in the enactments of Congress, but reason and necessity compel that it be implied from the exigencies of the situation.

In none of the cases which we have mentioned, nor in the cases cited in the extracts taken from the *Neagle case*, was it possible to say that the action of the President was directed, expressly or impliedly, by Congress. The situations dealt with had never been covered by any act of Congress, and there was no ground whatever for a contention that the possibility of their occurrence had ever been specifically considered by the legislative mind. In none of those cases did the action of the President amount merely to the execution of some specific law.

Neither does any of them stand apart in principle from the case at bar, as involving the exercise of specific constitutional powers of the President in a degree in which this case does not involve them. Taken collectively, the provisions of the Constitution which designate the President as the official who must represent us in foreign relations, in commanding the Army and Navy, in keeping Congress informed of the state of the Union, in insuring the faithful execution of the laws and in recommending new ones, considered in connection with the sweeping declaration that the executive power shall be vested in him, completely demon-

strate that his is the watchful eye, the active hand, the overseeing dynamic force of the United States. (See 1 Watson on the Constitution, 854.)

Energy in the executive is a leading character in the definition of good government.

* * * A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice a bad government. The Federalist, No. 70 (69), by Hamilton.

The very fact that the President, with the whole military and civil establishments of the Government at his command, has *the ability to act*, points directly to him as the appropriate agent of the Government when immediate action, executive in quality, is demanded in the public interest. But of what avail are this potency and this adaptability if they must await a command which can never be given? It is his duty to call the attention of Congress to serious and dangerous situations which may be fittingly met by legislation, and recommend the measures which he thinks should be enacted. But when a situation exists so pressing and so critical that the performance of these duties would be a barren form, must he stand by and do nothing while the public interests are being sacrificed or frittered away beyond recall? Not if this can be prevented by any act, *executive in quality*, which does not involve the making or infraction of a law, or the ex-

ercise of any other governmental power which, being vested generally in another department, is, by its very nature, or by the express terms of the Constitution, prohibited to him. As the Commander in Chief of the Navy, and in many ways the guardian of the national efficiency in warfare on the sea, the President was under a peculiar duty to consider the relation of these petroleum lands to the development of our naval strength and to our common defense in the future; and having found the lands of the greatest importance, it was clearly his duty to reserve them, at least until Congress could act upon the matter. This is all that he did. To have abstained or to have delayed the reservation longer would have been a neglect of his duty to execute the laws, in that generic and necessary sense which was recognized in the authorities which are cited above.

6. *An executive reservation implies no invasion of the province of Congress.*

The Constitution vests in Congress the power "to dispose of and make all needful rules and regulations respecting" the lands and other property of the United States. The question is whether an act of the President, purely protective in purpose and result, conflicts with this constitutional grant of power. In order to gain a perfect understanding of what is here involved let it first be observed that the President does not undertake to *dispose* of this property; on the contrary, he preserves it from disposition until Congress can ex-

press its will concerning it. Let it be understood, also, that he does not undertake to make any *regulation* or rule. Again, all that he does is subject to be undone by Congress, and Congress has merely to express its will in order to restore the situation to precisely what it was before the President acted. Lastly, in order that the question may be considered in all its simplicity, let it be assumed that, at the time when the President acts, there is no statute in existence which can be said to evince any intention of Congress either to forbid or to allow him to make such a reservation. We will, of course, assume, too, in accordance with the facts in the case at bar, that the preservation of the lands reserved is of very great importance to the public weal, and that, if the President can not act, no action can be taken in time to be effective—facts which render it highly probable, if not certain, that if the President does act, his action will receive the subsequent approbation of Congress (just as it was given in the present case).

The answer seems to depend upon whether one attributes to the constitutional provision a sensible meaning or one of a preposterous technicality. Did the Constitution mean to lock up the power over public property so exclusively in Congress that the Executive head of the Nation could not touch it, use it, or deal with it in any way, even for its protection, unless he could point to some statutory authorization? Are there no rights

in its property and no purposes concerning it which may be presumed to be the rights and purposes of the Government, when Congress has neglected to legislate? Must the President, beholding the public lands devastated by fire, or invaded and despoiled by trespassers, stand motionless and helpless because Congress has neglected to say how, in its desire, such situations should be treated?

It is plain that this limited authority is one which would naturally be supposed to exist; that it can work no harm whatever; that it may do incalculable good. It is altogether reasonable that it should exist. A scheme of government which neglected to provide for the contingencies which in our Government can only be met by this implied power of action would be so far defective and unreasonable. What, then, are the reasons which are alleged against the existence of this authority? None, but the bare proposition that the control over the public lands is vested exclusively in Congress. We concede that the control of Congress is potentially exclusive; but we deny that the Constitution itself excludes the President from performing acts which do not interfere with that control. There are no arbitrary dogmas of constitutional construction; reason dominates every rule that has ever been applied. There is no principle that the mere grant of a power not linked with any prohibition, *ipso facto*, prevents all exercise of authority over the same subject by other governmental agencies. The

question whether and to what extent the grant implies such a prohibition is to be determined by the nature of the power granted and of the acts said to be in conflict with it.

Thus the pardoning power is vested by the Constitution in the President, and yet it is established (partly by an early practical construction and partly upon the ground of noninterference) that this power may be exercised, in some respects at least, by the Secretary of the Treasury, acting pursuant to an act of Congress (*The Laura*, 114 U. S., 411, 415) and by Congress itself (*Brown v. Walker*, 161 U. S., 591, 601). This involves no interference with the President's power, because he remains at liberty to exercise it whenever he sees fit to do so.

A much closer analogy is found in the power of Congress over interstate commerce. This is potentially exclusive. Congress, by affirmatively occupying the entire field, can take away from the States any power they otherwise might have to touch the subject of interstate commerce. But nothing is better understood than that, in default of such exclusive occupation by Congress, there is liberty in the States to act, if their acts do not amount to a direct interference with interstate commerce on the one hand or clash with some regulation of Congress on the other. All that the express grant impliedly forbids of its own force is the direct interference.

The same principle is applicable in determining the respective powers of two branches of the Federal Government. The fact that a subject is committed generally to Congress should not be taken as *ipso facto* forbidding what would otherwise be a reasonable implication of authority in the Executive to deal with the subject in particular phases. Congress not having acted at all, the prohibition should be made to depend upon whether the executive action in question would amount to a direct interference with the congressional power of control. If it would not—and most assuredly it would not in the present case—the implication should be allowed, until excluded by some act of Congress.

It hardly need be added that the act of setting apart specific lands for a public reservation has no legislative quality. The authority to do this may be, and has been, delegated in the broadest terms, as by the statutes expressly authorizing the President to make and unmake forest reservations (act of March 3, 1891, 26 Stat., 1095, 1103; act of June 4, 1897, 30 Stat., 34), by the act of June 25, 1910, *supra*, respecting temporary withdrawals like the one in controversy, and by other statutes too numerous to mention. Congress may authorize the Executive not only to make reservations, but also to make regulations to insure their protection and govern their use, and it may even provide that a violation of the regulations shall constitute a criminal

offense. (*United States v. Grimaud*, 220 U. S., 506; *Light v. United States*, *id.*, 523.)

Even the rules which Congress adopts for the disposition of the public domain are not in the proper sense legislation.

Butte City Water Co. v. Baker, 196 U. S., 119, 125-126.

7. *The executive practice, acquiesced in by Congress and upheld by the courts, affords a practical construction of the President's authority under the Constitution.*

In *The Laura* (114 U. S., 411), the court was called upon to decide whether an act of Congress empowering the Secretary of the Treasury to remit certain fines and penalties was an encroachment upon the pardoning power of the President. It said (p. 416):

Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, "commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." (*Stuart v. Laird*, 1 Cranch, 299, 308.)

III.

The mining law is in no way inconsistent with the implied power of reservation.

As has already been sufficiently pointed out, the mining law can have no possible bearing upon the question of the President's authority, unless it be upon the theory that the authority, independently existing, was intended to be superseded by the law. To test this theory one must assume that the President had the authority to reserve mineral land for public purposes when the act was passed, and then inquire whether there is anything in the language of the act, or in the purposes which it was framed to accomplish, indicative of a legislative intention to take that authority away. That the act touches only the vacant, unappropriated public domain will hardly be contested. Indeed, it shows upon its face (R. S., 2322) that it was only to mineral deposits "on the public domain" (i. e., the "public lands," *Barker v. Harvey*, 181 U. S., 481, 490) that it was intended to apply. Subsequent statutes, and the peculiar conditions in California which gave rise to the mining legislation of 1866, as well as the history and administration of that legislation as a whole, might be invoked, if it were necessary, to show that the law never could have been intended to lay open the public reservations which had already been established to the intrusions of prospectors and to private acquisition. But it is useless to

pursue that point with elaboration; as to existing reservations, the proper construction of the law is plain.

Whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it.

Wilcox v. Jackson, 13 Pet., 496, 513.

Many authorities might be cited to the proposition that a prior appropriation is always understood to except lands from the scope of a subsequent grant, although no reference is made in the latter to the former.

Scott v. Carew, 196 U. S., 100, 111. See, also,

Leavenworth, &c., R. Co. v. United States, 92 U. S., 733, 745.

The words "public land" have long had a settled meaning in the legislation of Congress, and when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made.

Northern Lumber Co. v. O'Brien (C. C. A., 8th Circuit), 139 Fed., 614, 616.

McFadden v. Mountain View Min. & Mill. Co. (C. C. A., 9th Circuit, 97 Fed., 670, 680), besides

deciding expressly that the effect of an Executive order Indian reservation "was to exclude all intrusions upon the territory thus reserved * * * for mining as well as other purposes," involved also the construction of a statute providing that, after making certain allotments, a portion of the reservation should be opened by proclamation to settlement and entry, and "disposed of under the general laws applicable to the disposition of public lands." Of this the court said:

The general laws applicable to the disposition of the public lands embrace those relating to mining claims as well as those relating to preemption, homestead, and other entries. * * * (Citing *Newhall v. Sanger*, 92 U. S., 763.) While it is true that the right to mineral lands is initiated by location after the proper discovery of mineral thereon, and that such claims may be held and worked without purchase, yet the law authorizing their exploration also provides for their location, entry, and purchase. (Rev. Stat., secs. 2319-2350.) It necessarily follows that any of the lands of the United States that are by its general laws open to exploration for minerals are likewise open to location, entry, and purchase as such, if they be mineral in character and mineral be discovered therein. Hence it can not be true, we think, that the portion of the Colville Reservation restored to the public domain by the act of July 1, 1892, was any more open to the public in the exploration of minerals and

the location of mining claims thereon, in advance of the proclamation of the President therein provided for, than it was to any other kind of entry or settlement or disposition.

If it be clear that a general land law like the mining law may not be construed as authorizing interference with existing public reservations, it is equally clear that it may not be construed to interfere with an existing power to make public reservations. The same considerations of public convenience and necessity which support the one support the other. Both constitute provisions or instrumentalities of government. Therefore they are not to be deemed within the purview of a general law granting privileges to individuals which makes no mention of *them*.

If rights claimed under the Government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.

Leavenworth, &c., R. Co. v. United States,
92 U. S., 733, 740.

But there is no real occasion for applying this rule of construction. There is not even an apparent conflict between the mining law and the authority to make reservations. Both relate to the public lands, yet each remains but a mere potentiality in respect of them until something is done affirmatively to connect it with some specific tract or tracts. When that is done the specific lands are segre-

gated—they are no longer “public lands”—the general subject matter to which both the law and the reserving authority were potentially applicable has been reduced in quantity by so much, but in the process there has been no interference by one right or authority with another. The coexistence of numerous laws applicable to the same character of lands is a familiar feature of the public-land legislation. Thus the homestead law, the preemption law (now repealed), the desert-land law, laws giving to States and railroad companies the right of lieu selection, various laws concerning scrip, etc., might all be applicable to one and the same tract of land. No one would pretend to believe that as these laws were enacted each operated in turn to restrict the scope of the one that preceded it.

In *Behrends v. Goldsteen* (1 Alaska, 518, 524), which concerned the validity of a withdrawal of lands by the Secretary of the Navy, the court, on pages 524 and 525 of the opinion, said:

It has been so frequently decided that no mineral location can be lawfully made upon lands reserved from sale by the Government, that it is deemed inadvisable and unnecessary to discuss that question.

In *Gibson v. Anderson, supra* (131 Fed., 39, 41), the Circuit Court of Appeals said:

But there is no question here of repealing or suspending the operation of an act of Congress. The question is whether the

President could, by proclamation, reserve a portion of the unoccupied public lands of the United States for an Indian reservation.

And further, in the same opinion:

Congress did not thereby (by the mining act) dispose of any estate in the public lands, or create any burden thereon, or establish any right therein until the actual inception and assertion of mining rights thereunder. Statutory license to locate mining claims has never been held, prior to the acquisition of a vested right, to be an obstacle to either the disposition or the reservation of the public lands.

The right to enter under this law, as under any other general law—

is not a vested one in any particular land. It is an offer by the Government of a privilege, not a contract. (*Yosemite Valley case*, 15 Wall., 77.) The right or privilege to purchase extends only to lands subject to sale and not to those appropriated. (*Spaulding v. Chandler*, 160 U. S., 394; *Wilcox v. Jackson*, 13 Pet., 498.)

Longnecker's case (30 L. D., 611) (opinion approved by Assistant Attorney General Van Devanter).

See also Attorney General MacVeagh's opinion of October 21, 1881 (17 Op., 230).

The President's authority to reserve land for public purposes derives its very existence from the fact that without it the national interests would be jeopardized. That Congress would deliberately de-

stroy such authority, without supplying anything to take its place, is literally beyond belief. That Congress could be held to have done so, in the absence of a clear, direct, and specific expression of the intention, is legally impossible. And yet, thus far, the very bedrock of the defense in this case has been the proposition that such an intention was manifested in a general law, permitting individuals to occupy and acquire such portions of the public domain as are found to be unappropriated when they see fit to take advantage of the privilege. In other words, the court is requested to hold that this law, merely because, like every similar law, it describes and applies to a general subject matter, must be regarded as evidence, not merely of a legislative purpose to bring the subject matter within the possibility of private acquisition, but also as evidence of a clear, unequivocal legislative policy to remove the subject matter entirely from devotion to public use, however great the emergency and pressing the need. This view is plainly impossible.

CONCLUSION.

The reservation has been criticised because it was large, an argument which assumes that the national interests in small things may be protected, but denies them protection in great emergencies. The fact that Congress, in effect, approved the reservation, ought to suffice to settle this objection.

The only objection which can be made to the order of June 12, 1856, which was after

the passage of the act, is that the commissioner withdrew too much land, to wit, all land in the district, but that was a matter for the determination of the Land Department, and can not be revised or disregarded by the courts. *Spencer v. McDougal*, 159 U. S., 62, 64.

As usual in such cases, the authority claimed is sought to be borne down by piling up imaginary examples of extreme abuse. But our inquiry concerns not what might be done, but what actually was done in the case before the court. The possibility of abuse goes with every important authority, but it is well understood that this possibility must be accepted and passed by, in the task of sound construction.

Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the Government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail. *United States v. Lee*, 106 U. S., 196, 217.

This is particularly true in the present case, because the authority claimed, and the acts performed under it, are subject to the superior power of Congress.

But it has often been said that the fact that the exercise of power may be abused is no sufficient reason for denying its exist-

ence, and if restrictions are to be placed upon the exercise of this power by the Attorney General, it is for the legislative body which created the office to enact them. *United States v. San Jacinto Tin Co.*, 125 U. S., p. 284.

The fact that Congress approved the President's action affords a complete answer to the charge that his authority was abused.

It is respectfully submitted that the decree of the District Court should be reversed.

JOHN W. DAVIS,

Solicitor General.

ERNEST KNAEBEL,

Assistant Attorney General.

DECEMBER, 1913.

APPENDIX.

WITHDRAWAL ORDER OF SEPTEMBER 27, 1909.

SEPTEMBER 27, 1909.

The honorable the SECRETARY OF THE INTERIOR.

SIR: In accordance with your orders I have the honor to submit the following recommendation, which covers approximately 3,041,000 acres, *of which the larger part is probably private land* and not affected by this withdrawal.

TEMPORARY PETROLEUM WITHDRAWAL NO. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

[Here follow the descriptions of lands in Wyoming and California.]

Very respectfully,

(Sig.)

H. C. RIZER,
Acting Director.

Approved September 27, 1909, and sent to General Land Office.

FRANK PIERCE,
Acting Secretary.

ECF.

CORRESPONDENCE LEADING TO THE WITHDRAWAL
ORDER OF SEPTEMBER 27, 1909.

FEBRUARY 24, 1908.

The honorable the SECRETARY OF THE INTERIOR,

Washington, D. C.

SIR: I have the honor to call your attention to page 15 (inclosed herewith) of the Daily Consular and Trade Report of the Department of Commerce and Labor of Saturday, February 15, 1908, which directs attention to the superiority of liquid fuels—that is, petroleum products in one or another form—on steamships, and also to the policy of the British Government in using such liquid fuels as emergency fuels in battleships; also to the editorial on page 3 of the Oil Industry of January 15, 1908.

It will be easy, if desired, to multiply the authoritative statements already in print concerning the superiority of liquid fuel for the Navy. For that reason I have to recommend that the filing of claims to oil lands in the State of California be suspended in order that the Government may continue ownership of valuable supplies of liquid fuel in this region where all fuel is expensive.

It is evident from the many reports on the superiority of liquid fuel that the question of its adoption is simply a question as to the price at which suitable petroleum products can be purchased.

The present rate at which the oil lands in California are being patented by private parties will make it impossible for the people of the United States to continue ownership of oil lands there more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away.

The inadequacy of the coal supply on the Pacific coast is well known to every one who has made the subject of fuel a study. The local supply is derived entirely from a few mines on Puget Sound and one locality in eastern Washington. There are also some coal developments in Oregon, but no deposits here of a quality much above a lignite. In California the supply is limited to a small production of poor coal and coal briquettes about Mount Diablo, near San Francisco, and one mine in Monterey County, which is producing a small quantity of a fairly good bituminous which is not being marketed as yet, owing to poor transportation facilities. The great bulk of the coal used on the Pacific coast is obtained from our western inland fields or from Australia.

Regarding the petroleum supply, the production last year did not meet the requirements of the trade, and the reserve stock was drawn on to meet the demand. At present the rate of increase in demand is more rapid than the increase in production, and this, taken in connection with the great falling off in certain of the older fields, due to depletion of the sands and to flooding by water of sands which otherwise might be productive, shows how important is this matter of a conservation of the remaining supply.

Those areas in which the probabilities are greatest for striking commercial deposits of oil have nearly all been prospected with a drill and either proven or condemned. There are only a few areas of probable oil territory now remaining under governmental control, and these are rapidly being filed on and patented either through legitimate oil development or by subterfuge, over claims for gypsum,

etc. If anything is to be done regarding the matter, there is no question but that it should be done at once, for prospecting is now going on at an unprecedented rate throughout the West. All of the larger oil companies realize not only that the supply in the proven fields is limited, but that the area over which prospecting is liable to result favorably is also restricted.

Very respectfully,

GEO. OTIS SMITH, *Director*.

(Hearings held before the Committee on the Public Lands, H. R. 24070, May, 1910, p. 91.)

Director Smith's testimony, *loc. cit.*, page 97, shows that a copy of the above letter was sent by him to Secretary Ballinger, with another letter of September 17, 1909, which is as follows:

The honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to transmit herewith a copy of a letter addressed to your predecessor in February, 1908. The arguments presented in support of the recommendation made at that time are still valid, and they have been amplified in the survey's conservation report on the petroleum resources of the United States, a copy of which I submit herewith. In this report it is shown that the present production of petroleum exceeds the legitimate demands of the trade and that inasmuch as the disposal of the public petroleum lands at nominal prices simply encourages overproduction the logical method of checking this unnecessary waste would be to secure the enactment of legislation that would provide for the sane development of this important resource. In view of the well-known facts of the mode of occurrence of oil and the all too common

practice of drilling wells close to boundary lines of private holdings that are being developed for oil, conservation of the petroleum supply demands a law that will provide for disposal of the oil remaining in the public domain in terms of barrels of oil rather than of acres of land.

I have the honor to also call your attention to the estimate in the petroleum report that at least one-half pint of lubricating oil is used for every ton of coal converted into power, and that this quantity of lubricating oil represents over a half gallon of crude petroleum. Taking this into account, as well as the increasing use of fuel oil by the American Navy, there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government's own use. I would therefore renew my recommendation that pending the enactment of adequate legislation on this subject the filing of claims to oil land in the State of California be suspended.

In this connection it is important to note that, acting on my report of June 4, 1909, classifying certain oil lands in California, the Commissioner of the General Land Office issued instructions to registers and receivers to withhold these oil lands from agricultural entry pending consideration of the question of legislation. The area of oil land affected by this action is about 427,000 acres, to at least 40 per cent of which the Government retains title. In several townships—notably T. 32 S., R. 22 E.; T. 32 S., R. 23 E.; T. 32 S., R. 21 E.; T. 31 S., R. 21 E.; T. 31 S., R. 23 E.; T. 31 S., R. 22 E.; T. 31 S., R. 24 E., of the Mount Diablo meridian, and in T. 11 N., R. 24 W., and T. 12 N., R. 25 W., of the San Bernardino meridian—there are compact areas of

unappropriated oil land, each including from 6 to 16 contiguous sections.

Very respectfully,

GEO. OTIS SMITH, *Director.*

(Ib., 97.)

Upon receipt of these communications Secretary Ballinger addressed the following letter to the President, viz:

SEPTEMBER 17, 1909.

The PRESIDENT, *White House.*

SIR: I have the honor to bring to your attention the subject of the conservation of the petroleum resources of the public domain, with special reference to the present and future requirements of the American Navy.

The six largest battleships in commission or under construction are equipped for the use of either oil or coal, and the fourteen latest destroyers use oil exclusively.

The Geological Survey reports that the present rate of production of petroleum can not be maintained beyond a very few years, after which a marked decrease will result in an insufficient supply and increased prices. At present the production exceeds the legitimate demands of the trade, and inasmuch as the disposal of the public petroleum lands at nominal prices simply encourages overproduction the logical method of checking this unnecessary waste would be to secure the enactment of legislation that would provide for the sane development of this important resource. In view of the well-known facts of the mode of occurrence of oil and the all too common practice of drilling wells close to boundary lines of private holdings

that are being developed for oil, conservation of the petroleum supply demands a law that will provide for the disposal of the oil remaining in the public domain in terms of barrels of oil rather than of acres of land.

The Navy has a further interest in the conservation of the petroleum supply by reason of the absolutely necessary use of petroleum products for lubrication. A very conservative estimate is that at least one-half pint of lubricating oil is used for every ton of coal converted into power, and that this quantity of lubricating oil represents over a half gallon of crude petroleum.

The recommendation was made by the Director of the Geological Survey in February, 1908, to my predecessor that the filing of claims to oil land in the State of California be suspended in order that the Government may continue the ownership of a sufficient supply of petroleum on the Pacific coast, where other fuel is expensive. No action to this end has been taken.

Acting upon the survey's report of June 4, 1909, classifying oil lands in California, the Commissioner of the General Land Office on June 22, 1909, issued instructions to the registers and receivers to withhold these oil lands from agricultural entry pending consideration of the question of legislation. The area classified as oil land is 430,000 acres, to at least 40 per cent of which the Government still retains title. In several townships in this tract there are compact areas of unappropriated oil land, each including from 6 to 16 contiguous square miles.

As a result of previous work by the Geological Survey, similar action was taken in June, 1908, on

150,240 acres in California classified as oil land, the title to a considerable portion of which is believed to remain in the Government. Furthermore, there is at present withdrawn in California, pending examination and classification by the Geological Survey, which work is now in progress, approximately 1,650,000 acres, of which 1,250,000 acres are withdrawn from all entry.

The time appears opportune for legislative action that will assure the conservation of an adequate supply of petroleum for the Government's own needs. This legislation should give authority to fix the terms of disposition of public oil lands so as to provide for the future demands of the Navy and should also authorize the permanent reservation of such areas as the Executive, after full investigation, may find necessary for this Federal purpose. It is believed that such legislation would not interfere with the profitable development and utilization of the California oil pools.

In aid of such legislation and, indeed, as essential to the accomplishment of its purpose all the lands hereinbefore mentioned should be temporarily withdrawn from all forms of filing, entry, and disposal, including mineral entry. I have the honor to be,

Very respectfully,

R. A. BALLINGER,

Secretary.

(Ib., 98.)

Soon after the date of this letter, the Secretary and the Director conferred with President Taft at Salt Lake City (hearings before the Committee on Public Lands on H. R. 24070, p. 99), and thereupon,

on September 26, 1909, the Secretary wired to Acting Secretary Pierce:

Have conferred with President respecting temporary withdrawals covering oil lands. If present withdrawals permit mining entries being made of such lands wish the withdrawals modified at once to prohibit such disposition pending legislation.

The withdrawal now in question was made on the following day. Acting Secretary Pierce telegraphed to Mr. Ballinger, in care of the President's special at Helena, as follows:

Telegram 26th received. California and Wyoming petroleum withdrawals heretofore made permit mining locations. Following your direction I have temporarily withdrawn from all forms of location and entry 2,871,000 acres in California and 170,000 acres in Wyoming, all heretofore withdrawn for classification. My withdrawal prevents all forms of acquisition in future and holds the land in statu quo pending legislation.

It will be observed that the California and Wyoming lands were included in one and the same order.

REFERENCES TO REPORT OF SECRETARY OF THE INTERIOR AND PRESIDENTIAL MESSAGES.

In his report to Congress for the fiscal year 1909, submitted in the fall of that year, the Secretary of the Interior, after referring to the withdrawal order now in question, says (p. 11):

I desire to call attention to the importance of asking Congress to authorize the Executive to reserve certain areas of these lands

for the purpose of affording a supply of fuel oil *for the future use of the Navy*, and to make such regulations as may be necessary for the preservation and extraction of such deposits. No legislation exists for the entry of oil and gas lands, other than the general mining laws of the United States, which are not adaptable to the disposition of lands containing mineral oils and gas.

The President, in his message of January 14, 1910, spoke of the lax and prodigal manner in which the Government had been disposing of its public domain under the mining as well as other acts, of the great frauds which had been committed in the past, and of the "deep concern in the public mind respecting the preservation and proper use of our national resources." "This," he said, "has been particularly directed toward the conservation of the resources of the public domain. The problem is how to save and how to use, how to conserve and still develop." He classed among the noteworthy reforms of his predecessor the bringing to public attention to the necessity "for the enactment of laws amending the obsolete statutes so as to obtain governmental control over that part of the public domain in which there are valuable deposits of coal, of oil, and of phosphate." He then went on to elaborate upon the need of properly classifying the lands and disposing of the "treasure of coal, oil, asphaltum, natural gas, and phosphate contained therein" in such a way as to prevent monopolies and "to secure the governmental purpose and at the same time not frighten away the investment of the necessary capital."

In the President's message of December 6, 1910, he refers to and embodies an address which he made

before the National Conservation Congress at St. Paul on September 5 of that year. (See Appendix to Message.) In the address he said (p. 98):

In the last administration there were withdrawn from agricultural entry 2,820,000 acres of supposed oil land in California; 1,451,520 acres in Louisiana, of which only 6,500 acres were known to be vacant unappropriated land; and 74,849 acres in Oregon, making a total of 4,346,369 acres. In September, 1909, I directed that all public oil lands, whether then withdrawn or not, should be withheld from disposition pending congressional action, *for the reason that the existing placer-mining law, although made applicable to deposits of this character, is not suitable to such lands, and for the further reason that it seemed desirable to reserve certain fuel-oil deposits for the use of the American Navy.* Accordingly, the form of all existing withdrawals was changed and new withdrawals aggregating 2,750,000 acres were made in Arizona, California, Colorado, New Mexico, Utah, and Wyoming. Field examinations during the year showed that of the original withdrawals 2,190,424 acres were not valuable for oil, and they were restored for agricultural entry. Meantime other withdrawals of public oil lands in these States were made, so that November 15, 1910, the outstanding withdrawals amounted to 4,654,000 acres.

The needed oil and gas law is essentially a leasing law. In their natural occurrence, oil and gas can not be measured in terms of acres like coal, and it follows that exclusive title to these products can normally be secured only after they reach the surface. Oil should be disposed of as a commodity in terms of

barrels of transportable product rather than in acres of real estate. This is, of course, the reason for the practically universal adoption of the leasing system wherever oil land is in private ownership. The Government thus would not be entering on an experiment, but simply putting into effect a plan successfully operated in private contracts. Why should not the Government as a landowner deal directly with the oil producer rather than through the intervention of a middleman to whom the Government gives title to the land?

The principal underlying feature of such legislation should be the exercise of beneficial control rather than the collection of revenue. As not only the largest owner of oil lands, but *as a prospective large consumer of oil by reason of the increasing use of fuel oil by the Navy*, the Federal Government is directly concerned both in encouraging rational development and at the same time insuring the longest possible life to the oil supply. The royalty rates fixed by the Government should neither exceed nor fall below the current rates. But much more important than revenue is the enforcement of regulations to conserve the public interest so that the covenants of the lessees shall specifically safeguard oil fields against the penalties from careless drillings and of production in excess of transportation facilities or of market requirements.

One of the difficulties presented, especially in the California fields, is that the Southern Pacific Railroad owns every other section of land in the oil fields, and in those fields the oil seems to be in a common reservoir or series of reservoirs, communicating through the oil sands, so that the excessive drainage of oil at one well, or on the railroad territory

generally, would exhaust the oil in the Government land. Hence it is important that if the Government is to have its share of the oil it should begin the opening and development of wells on its own property.

In view of the joint ownership which the Government and the adjoining landowners like the Southern Pacific Railroad have in the oil reservoirs below the surface, it is a most interesting and intricate question, difficult of solution, but one which ought to address itself at once to the State lawmakers, how far the State legislature might impose appropriate restrictions to secure an equitable enjoyment of the common reservoir and to prevent waste and excessive drainage by the various owners having access to this reservoir.

It has been suggested, and I believe the suggestion to be a sound one, that permits be issued to a prospector for oil, giving him the right to prospect for two years over a certain tract of Government land for the discovery of oil, the right to be evidenced by a license for which he pays a small sum. When the oil is discovered, then he acquires title to a certain tract, much in the same way as he would acquire title under a mining law. Of course if the system of leasing is adopted, then he would be given the benefit of a lease upon terms like that above suggested. What has been said in respect to oil applies also to Government gas lands.

Under the proposed oil legislation, especially where the Government oil lands embrace an entire oil field, as in many cases, prospectors, operators, consumers, and the public can be benefited by the adoption of the leasing system. The prospector can be protected in the very expensive work that nec-

essarily antedates discovery; the operator can be protected against impairment of the productiveness of the wells which he has leased by reason of control of drilling and pumping of other wells too closely adjacent, or by the prevention of improper methods as employed by careless, ignorant, or irresponsible operators in the same field which result in the admission of water to the oil sands; while of course the consumer will profit by whatever benefits the prospector or operator receives in reducing the first cost of the oil.

**RECOMMENDATION OF GENERAL BOARD OF NAVY,
JANUARY 8, 1908.**

No. G B 407 HP

[2nd endorsement.]

GENERAL BOARD, NAVY DEPARTMENT,
Washington, D. C., January 8, 1908.

(Subject: Liquid fuel; necessity of all new destroyers and torpedo vessels being fitted to burn liquid fuel only. Letter from Commander C. C. Marsh, U. S. N.)

Respectfully returned to the Navy Department.

2. The General Board is of opinion that the use of oil fuel both as an auxiliary in large ships and as the sole fuel of destroyers and smaller vessels would be attended with marked advantages, and has recommended in its building programs for the current and preceding years that vessels be fitted accordingly.

3. The General Board therefore recommends that the installation of oil-burning apparatus in vessels under construction be proceeded with as

promptly as the department may consider practicable.

GEORGE DEWEY,
Admiral of the Navy, President General Board.

LETTER OF ACTING SECRETARY OF THE NAVY, JUNE
25, 1912.

DEPARTMENT OF THE NAVY,
Washington, June 25, 1912.

SIR: There exists a situation seriously affecting this department's future policy in the powering of naval vessels, and in which the cooperation of the Department of the Interior is required.

Since the beginning of the American Navy, our vessels, ship for ship, have been superior to those of our enemies. To this largely our uniform success in naval warfare has been due. Naval ordnance, engineering, and construction have now become so standardized throughout the world, however, that it is difficult to maintain this superiority.

It is now definitely determined, as a result of years of investigation, experiment, and development, that the use of oil as a fuel will render our vessels distinctly superior to the coal-burning vessels of other navies. Without any sacrifice in other features—guns, protection, or cruising radius—an oil-burning battleship can be given a speed about two knots greater than that of a coal-burning vessel. In a naval engagement this speed advantage would probably be a decisive factor.

Our position as an oil-producing nation should permit us to adopt this simple means of maintaining a superiority of type of vessels which is denied

to others, because no other important nation, except Russia, has an oil supply which is dependable in time of war.

In order to profit fully from the advantages of the liquid fuel, bunker spaces adjacent to the forerooms are omitted in an oil-burning vessel, the fuel being stowed in remote portions of the vessel which are unimportant for other uses. It is not practicable to convert such a vessel into a coal burner. It is manifest then that with our important naval vessels—oil burners—a failure of the supply might constitute a national calamity.

Therefore this department is unable to profit from the use of fuel oil to the extent of definitely adopting it for capital vessels until the certainty of a dependable supply, sufficient for the possible demands of war, has been established. This is estimated to be 500,000,000 barrels.

I am informed that there is in California, on public lands withdrawn from entry, oil estimated at four billion barrels. Were it definitely established that a sufficient quantity of this oil would remain in the ground there would be no occasion for the present concern of this department. It is understood, however, that until a sufficient quantity of the oil has been definitely reserved for the Navy there will always be a possibility of legislation permitting the removal of this oil under leases.

The demand for oil will, within the next few years, considerably increase. Already foreign nations are importing American oil for the purpose of building up artificial reserve supplies.

This department therefore earnestly requests the cooperation of the Department of the Interior to secure a definite reservation for the Navy, by Ex-

ecutive order, of oil-bearing public lands in California sufficient in extent to insure a supply of 500,000,000 barrels.

There are appended copies of correspondence on this subject under date of May, 1911.

Respectfully, yours,

BEEKMAN WINTHROP,
Acting Secretary of the Navy.

The honorable the SECRETARY OF THE INTERIOR.

REFERENCES TO LEGISLATION PENDING WHEN ORDER OF SEPTEMBER 27, 1909, WAS MADE AND INTRODUCED SOON AFTERWARDS.

Senate bill 438, 61st Congress, 1st session, introduced March 22, 1909, "To provide for the disposal of lands chiefly valuable for oil and asphaltum."

Repeals petroleum placer act and provides new method of location and purchase with restrictions on land and title acquired. Relates only to land in California.

Senate bill 597, 61st Congress, 1st session, introduced March 25, 1909, "Reserving from entry and sale the mineral rights to coal and other minerals mined for fuel, oil, gas, or asphalt, upon or underlying the public lands of the United States, and providing for the entry of the surface of public lands underlaid with or containing coal or other minerals mined for fuel, oil, gas, or asphalt, and providing for the leasing of the mineral rights in such lands."

Contains many sweeping provisions for public control.

House bill 9771, 61st Congress, 1st session, introduced May 17, 1909, "To provide for the disposal

of lands chiefly valuable for oil and asphaltum." Same as S. 438.

House bill 9964, 61st Congress, 1st session, introduced May 20, 1909, "To provide for the disposal of lands chiefly valuable for oil and asphaltum." Similar to H. R. 9771.

Senate bill 2623, 61st Congress, 1st session, introduced June 16, 1909, "To provide for the disposal of land chiefly valuable for oil."

Repeals old law and substitutes new procedure with certain restrictions.

Senate bill 4733, 61st Congress, 2nd session, introduced January 5, 1910, "Providing for the classification, care, and disposal of the public lands of the United States."

Gives express authority of withdrawal and provides that oil deposits shall not be sold, but may be leased.

Senate bill 5485, introduced January 18, 1910, "To authorize the Secretary of the Interior to make temporary withdrawals of areas of public land pending report and recommendation to Congress, or for examination and classification."

Senate bill 5488, introduced January 18, 1910, "To authorize the disposal of phosphate, oil, asphaltum, or natural gas."

Reserves all oil lands and provides method of leasing with careful limitations and restrictions.

House bill 22631, introduced March 9, 1910, "Providing for the classification, care, and disposal of the public lands of the United States." Same as S. 4733.

House bill 23382, introduced March 23, 1910, "To provide for the classification of the public lands of the United States."

House bill 23428, introduced March 24, 1910, "To authorize the President of the United States to make withdrawals of areas of public lands pending report and recommendation to Congress, or for examination and classification."

House bill 23699, introduced March 29, 1910, "To provide for the classification of the public lands of the United States."

House bill 23700, introduced March 29, 1910, "To authorize the disposal of phosphate, oil, asphaltum, or natural gas." Similar to S. 5488.

House bill 23703, introduced March 29, 1910, "To authorize the President of the United States to make withdrawals of public lands in certain cases."

House bill 23704, introduced March 29, 1910, "To authorize the President of the United States to make withdrawals of such areas of public land for classification and other purposes pending report and recommendation to Congress."

House bill 23909, introduced April 1, 1910, "To authorize the President of the United States to make withdrawals of areas of public lands for classification and for other purposes, to require reports to be made to Congress of withdrawals heretofore made and hereafter to be made, and to provide for the classification of land heretofore withdrawn or that may hereafter be withdrawn."

House bill 23914, introduced April 1, 1910, "To authorize withdrawals and provide for classification of public lands."

House bill 23915, introduced April 1, 1910, "To authorize withdrawals and provide for classification of public lands."

Senate bill 7587, introduced April 4, 1910, "To provide for the granting by the Secretary of the Interior of permits to explore and prospect for oil and gas on unappropriated and withdrawn lands,"

Contains limitations and restrictions as to permits and provides that no right to the acquisition of oil land shall be initiated otherwise.

House bill 24011, introduced April 4, 1910, "To authorize the President of the United States to make withdrawals of public lands in certain cases."

House bill 24070, introduced April 5, 1910, "To authorize the President of the United States to make withdrawals of public lands in certain cases," as amended, this became the act of June 25, 1910.

Senate bill 7726, introduced April 14, 1910, "To authorize the President of the United States to make withdrawals of public lands in certain cases."

Senate bill 7795, introduced April 18, 1910, "To authorize the President to make withdrawals of areas of public land."

ACT OF JUNE 25, 1910 (36 STAT., 847).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall

remain in force until revoked by him or by an Act of Congress.

SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one

heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

REFERENCES TO LEGISLATIVE PROCEEDINGS ATTENDING PASSAGE OF THE ACT OF JUNE 25, 1910, AND REPORT OF SENATE COMMITTEE.

The act of June 25, 1910, originated in the House of Representatives in the so-called "Pickett bill," H. R. 24070. Prior to the hearings on this bill (begun on May 13, 1910) there had previously been a report by the Senate Committee on Public Lands on the somewhat similar Senate bill, S. 5485. Later the House bill was substituted in the Senate for 5485, and was favorably reported in the House and Senate. The majority of the Senate Committee on Public Lands, and apparently a majority of the Senate, were of the opinion that the bill was unnecessary to give the President the power of withdrawal, but in view of the President's insistence and the advisability of limiting the power, favored the passage of the bill. In reporting the bill the chairman of the committee (Nelson) states:

But, Mr. President, as I have already stated, while in my opinion the President has this power and even greater power than is conferred in this bill, I think it is a good plan, in view of the experiences we have had in recent years, that we put this power in direct and express statutory form, rather than the common law of the courts, and *limit it as*

we propose to do in the bill. The administration is satisfied with it, and while I think it limits the power of the executive department as it has it to-day under the interpretation of the courts, yet if the administration charged with the disposal and the management of our public lands is satisfied with this legislation, I am ready to support it, and I am willing that such a law should be enacted. (P. 7475, Cong. Rec., vol. 265, 1910.)

A minority was not wholly in accord with the majority, and submitted a report in part as follows:

But while this minority is unable to agree that the Executive has present power to withdraw lands generally from the operation of the land laws without express or implied authority from Congress, it still believes that with proper limitations that authority should be conferred; therefore, it stands upon the recommendation that this bill should be passed with the following amendments:

First. Such an amendment as would agree to the withdrawal for "public purposes" in such manner as would construe "public purposes" to be purposes for governmental use, and,

Second. That such withdrawals should automatically cease with the expiration of the Congress to which they should be reported. (Cong. Rec., 1910, p. 7548.)

Thereupon, the following proceedings occurred (continuing):

The PRESIDING OFFICER. The question is on the amendment of the Senator from Wyoming [Mr. Clark].

Mr. NELSON. Mr. President, the adoption of the amendment proposed by the Senator from Wyoming [Mr. Clark] would, to my

mind, be utterly destructive to the entire bill. It would repeal a power that now exists in the President. * * *

(The amendment was defeated.)

[Senate Report No. 171, 61st Congress, 2d session.]

TEMPORARY WITHDRAWALS OF CERTAIN PUBLIC LANDS.

FEBRUARY 3, 1910.—Ordered to be printed.

Mr. NELSON, from the Committee on Public Lands, submitted the following report, to accompany S. 5485:

The Committee on Public Lands, to whom was referred the bill (S. 5485) to authorize the Secretary of the Interior to make temporary withdrawals of areas of public land pending report and recommendation to Congress, or for examination and classification, having had the same under consideration, report it back recommending passage of the following amendment as a substitute for the entire bill. Strike out all after the enacting clause and insert the following:

That the President may, at any time in his discretion, withdraw from settlement, location, sale, or entry, any of the public lands of the United States and reserve the same for forestry, water-power sites, irrigation, classification of lands, or other public purposes, to be specified in the orders of withdrawals, and such withdrawals and reservations shall remain in force until revoked by him or by an act of Congress. The Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

The power conferred upon the President by the proposed substitute is a power that he has possessed and exercised almost from the inception of our public-land system and is a power that he still possesses and exercises.

The power of the President to reserve public lands from sale and entry rests upon various statutes, upon numerous decisions of the courts, and upon long-established and long-recognized usage.

The preemption act of 1830 (4 Stat., 421) provided that the privilege of preemption should not extend to any land "which is reserved from sale by act of Congress or by order of the President." This clearly gives the President the power, on his own motion, to make the reservation and leaves it in his discretion to exercise the power, and the power may be exercised through an executive department. In such cases it is deemed the act of the President.

In the case of *Wilcox v. Jackson* (13 Peters, 498) the reservation was made by the Commissioner of the General Land Office upon the request of the Secretary of War. This was held to be valid and to be the act of the President. (See p. 513.) In the case of the *United States v. Stone* (2 Wall., 525) this view is sustained.

The general preemption law of 1841 (5 Stat., 456), which remained in force until 1891—about fifty years in all—provided that—

no lands included in any reservation by any treaty, law, or proclamation of the President * * * shall be liable to entry under * * * the provisions of this act.

In the Des Moines land-grant act (11 Stat., 9) the reservation covered land—

reserved * * * by any act of Congress or in any other manner by competent authority for * * * aiding in internal improvements, or any other object whatsoever.

The reservation in this case was made in the first instance by the Secretary of the Treasury while he had charge of the public lands, and afterwards by the Secretary of the Interior after the public lands were placed under his jurisdiction; and the reservation made by these officials was held to be the act of the President and to be done by "competent authority." (*Wolcott v. Des Moines*, 5 Wall., 681.)

In the act providing for the survey of public lands in California (10 Stat., 246) are found the words "or reserved by competent authority," and this "authority" is held to be the President. (*Grisar v. McDowell*, 6 Wall., 363.)

In the case of *Grisar v. McDowell*, cited above, the point was raised that no reservation could be made except under a direct sanction of an act of Congress, and that the President did not possess the power to make such reservation. In reply to this objection the Supreme Court makes the following response:

But, further than this, from an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

The authority of the President in this respect is recognized in numerous acts of Con-

gress. Thus, in the preemption act of May 29, 1830, it is provided that the right of preemption contemplated by the act shall not "extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatever." Again, in the preemption act of September 4, 1841, "lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes," are exempted from entry under this act. So by the act of March 3, 1853, providing for the survey of public lands in California, and extending the preemption system to them, it is declared that all public lands in that State shall be subject to preemption, and offered at public sale, with certain specific exceptions, and, among others, "of lands appropriated under the authority of this act, or reserved by competent authority." The provisions in the acts of 1830 and 1841 show very clearly that by "competent authority" is meant the authority of the President and officers acting under his directions.

Attorney General Miller, in an opinion delivered by him (19 Op. Attys. Gen., 373), declared, when it was objected that certain statutes cited did not authorize the reservation in question to be made:

To this I answer that in my opinion the validity of the Executive order of August 5, 1878, and that of February 19, 1877, to which it was supplemental, rest not on that statute, but on a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, such parts of the national domain, open to entry and settlement, as he may deem proper.

While no express or direct statutory power has been given the President to create Indian reservations by mere Executive orders, yet such power has been repeatedly expressed by the President, and it has been held that such power has been rightfully and lawfully exercised. (See opinion of Attorney General Brewster, 17 Op. Attys. Gen., p. 258.) In this opinion are cited many instances of the creation of Indian reservations by Executive orders.

The case of the *United States v. Payne* (2 McCrary's Circuit Court Reports, 289) is in harmony with and upholds the power of the President in such cases.

In the matter of our mining laws, section 2319 of the Revised Statutes of the United States provides that—

all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase and the lands in which they are found to occupation and purchase. * * *

In the case of *Gibson v. Anderson* (United States Circuit Court of Appeals Report, vol. 65, 277) it was held that the proclamation of the President reserving certain lands for the use of the Indians had the effect of withdrawing the land reserved from the operation of the mining law quoted above. The court declares (p. 288):

There can be no doubt that such reservation by proclamation of the Executive stands upon the same plane as a reservation made by treaty or by act of Congress.

The Executive power of making reservations, conferred by the preemption law of 1841 also inheres and appertains to the homestead law.

Section 2289 of the Revised Statutes of the United States provides that—

every person * * * shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which such person may have filed a preemption claim, or which may, at the time the application is made, be subject to preemption at one dollar and twenty-five cents per acre; or eighty acres or less * * * at two dollars and fifty cents per acre.

This section, in effect, excludes from the operation of the homestead law the same class of lands that were excluded from the operation of the preemption law of 1841, to wit, "lands included in any reservation by any treaty, law, or proclamation of the President for any purpose"; so that the President has the same power of making reservation in the case of land subject to homestead entry as he had in the case of lands subject to preemption entry.

The phrase "public lands," found in our various land laws, is used in our legislation to describe such lands as are subject to sale or other disposition under general law and not to lands that have been reserved by treaty, act of Congress, or Executive proclamation. (*Newhall v. Sanger*, 92 U. S., 761.)

The timber-culture laws of 1874 and 1878, which remained in force until 1891, were limited to "public lands of the United States"; in other words, that law did not allow other than "public lands" to be secured under it, and lands reserved by the

President by proclamation or Executive order were not such "public lands."

The timber and stone act of 1878 only applied to "unappropriated, uninhabited, and unreserved nonmineral land of the United States * * *."

See also the following cases in support of the Executive power of withdrawal and reservation: *Wolsey v. Chapman*, 101 U. S., 755; *Spencer v. McDougal*, 159 U. S., 62.

The statutes cited, as well as the decisions of the court above referred to, and other decisions that might be cited, as well as the opinions of the Attorneys General, all go to show that the President of the United States has the inherent power to reserve for public purposes lands of the United States from location, sale, or entry.

It is only lately that this power has been doubted and questioned, and the object of the proposed substitute is to make it definite and clear beyond all dispute that the President possesses this power of withdrawal. The only change in existing law, as interpreted by the courts, is that part of the proposed substitute which provides that the "Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of withdrawals."

INDEX.

I. Regarding the mining law.....	Page. 2
II. Regarding the purposes of the reservation.....	4
III. No distinction can be made between the lands in Wyoming and the lands in California in re- spect of the purposes of the order of with- drawal.....	8
IV. The authority of the President may be reasona- bly implied from his statutory duties concern- ing the Navy.....	11
V. The authority of the President to make perma- nent reservations for immediate or future oc- cupation by the military forces—an authority which certainly must be conceded in spite of the defendants' assertions to the contrary— is no more readily to be derived by implica- tion from the President's duties respecting the Army than is the authority in controversy to be derived from his duties respecting the Navy.....	16
VI. Relations of the reservation to the Executive practice and congressional recognition.....	18
VII. The reservation should be upheld independently of the naval purpose.....	24
CONCLUSION.....	26

CASES CITED.

<i>Atchison v. Peterson</i> , 20 Wall. 507, 512.....	20
<i>Basey v. Gallagher</i> , 20 Wall. 670.....	20
<i>Broder v. Water Co.</i> , 101 U. S. 274, 276.....	20
<i>Buford v. Houtz</i> , 133 U. S. 320, 326.....	19
<i>Grisar v. McDowell</i> , 6 Wall. 363.....	23



In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES	} No. 750.
v.	
THE MIDWEST OIL COMPANY ET AL.	

*ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The objective of the argument contained in the defendants' brief is to bring the President's order into fatal hostility with the mining law. To achieve this result the brief undertakes to place upon both the order and the law constructions which are obviously untenable, and have, for the most part, been anticipated in our opening brief. There is a studied effort by this means to picture the President's act as an act of usurpation, and to portray this case as one involving a serious dispute concerning the constitutional boundary between the executive and legislative powers. We agree with the defendants' conclusion that the case is very important, and we do not believe that the true reason for its importance will be

obscured by this process of constructing and destroying a man of straw. No such constitutional question as the defendants have fashioned is here involved. If it be true that the order is inconsistent with the purposes of Congress, as they may be gathered from the mining law and other sources, the reservation falls, and there is no room for further argument.

I.

Regarding the mining law.

The defendants, in effect, attribute to the mining law a purpose to dedicate all the public mineral lands in the United States to private acquisition. They treat it as though it evidenced an intention of Congress that every foot of such land should be devoted to this purpose and none other. Their idea seems to be that every parcel has been acted upon by the legislative will and appropriated as effectively as though it had been specifically described and set apart by the statute. This theory is so clearly untenable that we see no occasion to add to what has been said on the subject in our opening brief, pp. 17, 18, 67, 97. There is no more reason for saying that the mining law affected the status of mineral lands than for saying that the preemption and homestead laws affected the status of agricultural lands. Not one of these acts, nor any of the other general land laws, imports an intention of Congress to reserve or segregate or alter the status of any land. Their effect is merely to confer new privileges to select and acquire parcels out of the mass of public

land. They make it possible for an individual to become the grantee of a small part of that which the Government owns, but they do not guarantee that there will be lands for him to select, they do not affect the Government ownership of the lands which he does not select, and they do not operate in the slightest degree to diminish the public necessities or alter the public relations in respect of those lands.

We confess our inability to grasp the pertinency of that part of the opposing brief (pp. 110-130), which seeks to draw a distinction between agricultural and mineral lands in respect of the President's authority to appropriate for public purposes. It is perfectly true, as counsel point out, that before 1866 all mineral lands were reserved from disposition. It is equally true that the reason for this general reservation was that the minerals were regarded as peculiarly important to the public. In a generic sense they were reserved for public purposes. Hence, if an occasion arose to devote any part of them to public use, no order of withdrawal was necessary. But since the general mining law has conferred upon private persons the privilege of acquiring lands of this kind, some form of official action is required to segregate those portions which are demanded by the public needs. The public mineral lands are quite as much affected by the public interest as the public agricultural lands, and it would seem plain beyond controversy that if the President is a proper agent of the Government to reserve the latter, he may reserve the former also.

II.

Regarding the purposes of the reservation.

1. The broad question of the President's authority to withdraw land from the operation of the general land laws solely because those laws, contrary to the anticipation of Congress, are operating in ways injurious to the public interests, is not necessarily involved in this case. It may possibly be the sole question involved in cases which may arise in the future concerning land embraced in some of the extensive withdrawals (mentioned by President Taft in his messages of January 14, and December 6, 1910) of land containing phosphate deposits, water-power sites, etc. This undoubtedly was the question that the President had in mind when he used the language quoted on page 126 of the defendants' brief, and the language quoted on pages 65 and 66 of ours. We shall have something to say upon this question further on.

2. In this case there was the entirely distinct purpose of supplying a definite public use, to wit, fuel for the Navy. The purpose was to be achieved in two ways. First, by selecting and segregating specific lands for that use alone, and, second, through public control over the use of the remaining lands not so segregated. This purpose permeated the entire reservation, and the fact (if it were such) that there was a collateral purpose which, standing alone, would have been insufficient or objectionable, could not be invoked to defeat the reservation.

3. Even if there were a doubt regarding the purpose, the doubt should be resolved in support of the withdrawal. If the naval purpose be necessary to sustain the President's action, it must be presumed that he acted for that purpose, in the absence of the clearest possible showing that he acted exclusively for another, and unauthorized purpose. It would be an extraordinary thing, flying in the face of one of the clearest and most salutary rules of law, if this reservation, made for the public protection, the importance of which to the public can scarcely be overestimated, should be declared void upon a mere doubt, and in the absence of a complete demonstration that its object was unlawful.

4. But there is no doubt. The order was the immediate outcome of a recommendation based particularly and entirely upon the naval need. We have the President's own word, in a message to Congress, that this purpose was involved. As the defendants point out in their brief, a part of the lands have since been examined and set apart specifically for the Navy, and there is no reason to suppose that other parts will not be similarly designated in the future if, as is more than likely, these special reservations shall turn out to be inadequate, when the character of the lands, the state of the title, and the measure of the naval necessity are better known.

As a contradiction of the naval purpose, much stress is laid by defendants' counsel upon the fact that all of the supposed oil lands were reserved. The reservation now in question did not reserve all; but what

if it did? If the temporary reservation of all was found necessary, then all could be reserved. If there were only one township of public oil land remaining, would the President be precluded because there was no more? If he may reserve one acre may he not reserve a thousand, or a million if necessity requires? The defendants seem to feel that the authority to satisfy the public need is limited by some principle of equitable apportionment between the Government and the private locator.

There is a strong tendency in the defendants' brief to overrate the magnitude of the area reserved. The figures which the defendants quote represent the total areas of the townships and subdivisions specified in the orders of reservation, whereas it is only upon the public lands within those descriptions that such orders profess to operate. Thus in the letter of the Acting Director of the Geological Survey which embodies the order of September 27, 1909 (Brief, p. 107), it is stated that the order "covers approximately 3,041,000 acres, of which the *larger* part is probably *private land*, and not affected by this withdrawal." In spite of the common practice of confounding the acreages described with the acreages of public land withdrawn, it is a fact easy of verification that generally if not always there is a large percentage of land included which is in private ownership or subject to private claims. This would be especially true of mineral lands, since mining claims prior to application for patent are not of record in any Federal office, and the conditions under which the orders must be prepared

necessarily preclude a preliminary examination on the ground concerning the state of the title. It is safe to say in regard to this order, that there was not, and even now is not, definite information as to the quantity of public land affected; that there was not, and is not, any certainty as to the quantity or availability of the oil in the lands which were public; and that the proximity of private holdings renders problematical how much of that quantity, if known, would be liable to be lost to the Government through private operations. The problem being to preserve an adequate—which means an immense—supply of naval fuel against necessities and emergencies of the future, it will readily be seen how the uncertainties besetting the entire situation required a broad extension of the reservation.

It will be borne in mind that while the ultimate purpose was definite the reservation as made was preliminary in character. Its immediate purpose was to protect the status of the lands until, with more definite information, the precise areas required for the public use could be ascertained and defined. The remaining lands could then be disposed of under the existing law or in such other ways as Congress might provide. Congress approved the plan by the act of June 25, 1910, and the President has since proceeded with its execution to the extent of designating the two special naval reserves in California. But this does not mean that the lands thus designated, even when relieved from intrusions like the one

attacked by the bill in the case, contain all the oil which the Navy will require, or that the deposits which they do contain will be secure against drainage through lands adjacent. Neither does it indicate that the actual needs of the Navy have been definitely and finally computed.

Upon the whole we can not see that there is even plausibility in the argument that because the order was aimed to include all the vacant lands then believed to contain valuable deposits of oil, therefore it must be understood as having overshoot the naval purpose. This argument, if legitimate under any circumstances, is certainly worthless in the absence of any showing that both the naval requirements, and the identity of public oil lands containing a supply of oil (not subject to be endangered by private operations), sufficient in quantity and quality, and of suitable location, were known when the reservation was made.

III.

No distinction can be made between the lands in Wyoming and the lands in California in respect of the purposes of the order of withdrawal.

The lands are all included in the order without any distinction whatever. Though far from the Pacific, the Wyoming lands are so much the nearer to the Atlantic seaboard. The California lands are much more accessible from the sea, and for that very reason would be the more liable to capture by a hostile force, while the Wyoming lands are fully protected by their remoteness.

It is true (as the defendants say in their brief, p. 28) that Wyoming lands had been previously withdrawn from agricultural entry pending examination of their character, and were left free for exploration and purchase under the mineral law, but this is also true of lands in California. See our principal brief, pp. 51 (bottom), 52 (top), 113, 115, 117; Bulletin 537, U. S. G. S., p. 38.

In their endeavor to establish a distinction, the defendants rely very largely upon the fact that the recommendation of the Secretary and the Director referred to California lands, and that the President in a part of his message of December 6, 1910 (Government's brief, p. 117; defendants' brief, p. 12), spoke of his purpose "to reserve certain deposits for the use of the American Navy." Undoubtedly the President's intention was that ultimately certain definite areas out of the whole quantity reserved should be selected and set apart for the naval use—a plan which could not be carried out until after a careful examination of the lands and the state of the title had been made, nor until the probable needs of the Navy had been ascertained. This sufficiently explains his use of the expression "certain deposits." The mention of California lands only, in the letters recommending the withdrawal, is evidence that those lands were first in the minds of the officials who wrote the letters, and may be taken also as evidence that they were prominent in the mind of the President when he acted upon their recommendation. But it is *not* evidence

that, to the mind of anyone, the Wyoming lands were not desirable for the naval purpose, and it can not be relied on to overcome the natural inference that all of the lands included in the one order were intended to be reserved for the same purpose.

There is an intimation in the defendants' brief (p. 28) that the Wyoming lands were included without the President's knowledge. The documents affirmatively disprove this. The Acting Secretary who signed the order telegraphed immediately to the Secretary, who was then with the President, as follows:

Telegram 26th received. California and Wyoming petroleum withdrawals heretofore made permit mining locations. Following your direction I have temporarily withdrawn from all forms of location and entry 2,871,000 acres in California and 170,000 acres in Wyoming, all heretofore withdrawn for classification. My withdrawal prevents all forms of acquisition in future and holds the land in statu quo pending legislation.

See Government's principal brief, p. 115.

It is only by conjecture that any distinction can be drawn between the purpose of the reservation in California and its purpose in Wyoming. We submit that there is no warrant for attacking it piecemeal in this way, and that, being a single legal entity, the reservation must stand or fall as such.

IV.

The authority of the President may be reasonably implied from his statutory duties concerning the Navy.

Section 417 of the Revised Statutes, taken from the act of April 30, 1798 (1 Stat. 553), which established the Department of the Navy, provides:

The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the Naval Establishment.

Section 1552 provides:

The Secretary of the Navy may establish, at such places as he may deem necessary, suitable depots of coal, *and other fuel*, for the supply of steamships of war.

The Executive is expressly required by law to keep naval vessels in service in time of peace (R. S. sec. 1534), and of course there can be no question that, so far as the means at his command will permit, it is his duty to keep the Navy as a whole in a state of preparation for the emergencies of war. The laws which provide for the construction of new vessels leave the selection of the fuel and machinery that shall move them to the executive discretion. (See 36 Stat. 628, 1287; 35 Stat. 158, 777; 34 Stat. 582, 1203; 24 Stat. 215.) The acts appropriating money to enable the Secretary to establish depots

according to R. S. section 1552, *supra*, and to purchase fuel for regular use, expressly authorize the procurement of "*coal and other fuel.*" (See 35 Stat. ch. 255, p. 761.) Without doubt, then, it lies within the executive authority to adopt oil as the naval fuel, and without doubt it is a matter of executive duty to substitute oil for coal if that course will conduce to the greater efficiency of the Navy. It is the duty of the executive to select the fuel, to select the best fuel, and to see that it is provided and kept in readiness in sufficient stock to satisfy present needs and to guard against future emergencies.

If the fuel is to be purchased, it is the executive duty to make use of the moneys which Congress has appropriated, and to inform Congress of the amounts of money which will be needed in addition. But it would be an unnecessary and exceedingly narrow and injurious view of the whole executive duty to hold that because Congress has customarily appropriated, and will appropriate, sufficient money to buy, therefore the executive function is that of a mere purchasing agent for Congress. If the best quality of fuel—the quality best suited to render our warships equal or superior to the ships of other powers—be found only in the public domain, or if, by reason of a combination of physical and economic conditions, it be there, and only there, that a supply can be found and controlled, sufficient as an insurance against a dangerous and perhaps fatal shortage in the future—is it possible to say that no duty arises and rests upon

the Executive in consequence of the legislation we have mentioned? The only question that can exist here respects the nature and extent of the duty, not its existence. The duty must be measured by what is necessary or reasonable in fulfilling the spirit of the statutes which impose it. The effect of those statutes is to put the Executive under a trust to be constantly informed of what is and will be needed in the way of fuel, to provide it in proper quantity, quality, and location, if the means at his command will allow, and to request additional assistance from Congress when they will not. Now, if the only safe and adequate supply is found in the public lands and therefore already in Government ownership, it is manifestly the duty of the Executive, if it has not the authority to appropriate the deposits directly, to inform Congress of the facts and request the authority. Not to do so would be a dereliction of the trust. The duty to do so arises not only from the constitutional duty to keep Congress informed of the "state of the Nation," but it springs also, immediately, from the statutes. But if, by reason of the circumstance that they have not been reserved from the general laws, the lands, or material portions of them, are in imminent danger of passing into private control and the fuel deposits exploited and exhausted, it can hardly be imagined that the full duty would be performed by merely laying the facts before Congress. A tentative reservation or appropriation of the lands, either by taking actual possession of them or by an equivalent proclamation or other official act, would be the only course meet for

the situation. The power to take that course is therefore fairly and reasonably to be implied from the statutes which we have mentioned, for if any power is to be implied from them, it must be a power commensurate with all their purposes.

We have not contended for an unlimited authority to make immediate use of oil deposits or permanently reserve them for future use without reference to congressional action. The proposition that such a power exists goes far beyond what is necessary to sustain the reservation actually made, and we have not thought it necessary to establish the greater in order to maintain the less. We submit, however, that the authority of the Executive to make use of the natural products of the public domain in certain contingencies may not seriously be denied. If a revenue cutter or other public vessel were to run short of fuel, would any one question the right of her officers, in the absence of any other resource, to lay in a supply of coal or wood, if such were to be found accessible, from public lands? If fuel were needed for troops stationed in quarters remote from any market, the use of public coal or public trees would be upheld as a matter of course. In fact it has been more or less customary for the President to reserve both coal and timber lands for military uses in the West, although Congress has never expressly authorized even the use under necessity, much less the making of reservations for future necessities.

On principle, no line can be drawn between an appropriation to meet a necessity for immediate use and an appropriation to meet a necessity for a future use. In the one case it is necessary to use now; in the other it is necessary to hold now for a use which will be required hereafter. If an actual use be justified as an incident to the present performance of an executive duty, an actual holding and preservation must be justified as an incident to the future performance of an executive duty. To illustrate: First, if the President has sent troops to a remote locality where the only means of obtaining fuel consists in a resort to wood or coal on public land, the duty of maintaining them there carries with it the right to take possession of that fuel and use it. Secondly, if he finds that he must send troops there at some time in the future, and that there is an immediate danger that the fuel will pass into the control of private interests, so that an adequate supply may not be available for the troops when they reach their destination, his duty to send the troops there and maintain them carries with it the right to take possession of the fuel and hold it, or protect it by an executive order, which amounts to the same thing. There is no violence in these implications. The fuel is public property and the highest use of which it is susceptible is the public use.

Neither is it practicable to draw a judicial boundary between good and bad reservations, based on a judicial estimate of necessity. The question whether

a necessity for use can or will exist is certainly a question to be settled by the Executive and by Congress. Here the judgment of the Executive, though it does not control Congress, concludes the courts. And however remote the time of use may appear, the fact can not escape that instant reservation may be imperative to make the use possible when that time arrives.

V.

The authority of the President to make permanent reservations for immediate or future occupation by the military forces—an authority which certainly must be conceded in spite of the defendants' assertions to the contrary—is no more readily to be derived by implication from the President's duties respecting the Army than is the authority in controversy to be derived from his duties respecting the Navy.

The President, in his discretion, should move troops to the places where their services are needed, and quarter them in convenient localities; but the duty to do these things produces no imperious necessity for withdrawing public land for permanent reservations. It would be *possible* to wait, and request Congress to reserve public land or acquire private land by purchase or condemnation.

It is no more the President's duty to provide land for military posts and forts than to provide fuel for the Navy. In both cases it is plainly his duty to consider the future as well as the present and the demands of war no less than the demands of peace. In each case alike it is open to him to request Congress to appropriate public land or to appropriate public

money to buy or condemn private land. In legal principle, therefore, the two cases do not differ in any respect. If the circumstances may warrant a temporary executive reservation in the one case, they will in the other. The only differences of quality that may be suggested between the customary military reservation and the reservation with which we are now concerned are these: The military reservation, sustained by precedent and authority, contemplates immediate and protracted use, without waiting for Congress to approve, and its primary purpose respects the occupancy of the land rather than the consumption of its products, whereas the present reservation is tentative, expressly subject to the approval of Congress, and its ultimate purpose respects the use of a natural product. Thus it will be seen that, in one way, the military reservation goes much farther—assumes far more—than the naval reservation. The other distinction, found in the nature of the contemplated use, is wholly immaterial in view of the express subjection of the naval reservation to the scrutiny and action of Congress.

In so far, then, as the two kinds of reservations rest upon implications to be derived from the executive duties growing out of the statutes relating to the military and naval establishments, a military reservation is no more clearly sustainable than the reservation here in question. In truth, this reservation may be more readily justified because of the unique importance of its purpose and the difficulty or impossibility of finding an equivalent.

Relations of the reservation to the Executive practice and congressional recognition.

1. The defendants assume (a) that the only phases of the practice to be considered are those which occurred many years ago, and (b) that affirmative action by Congress can alone give evidence of congressional recognition. We take issue upon both of these propositions.

(a) Antiquity is not the only touchstone. The numerous instances of executive withdrawals made for a wide variety of purposes during the last ten years (Brief, pp. 51-55), are not to be ignored as evidence of the scope of the Presidential authority. We have shown that a number of these were subsequently recognized by Congress. An agent's implied authority widens as his acts extend, with the knowledge of his principal. Congress knew of all of these withdrawals through the reports of the Land Department. In no instance did it disapprove. The implication of consent is inevitable.

(b) When such acts of the Executive are repeatedly performed with the knowledge of Congress, the assent of Congress may be inferred from its silent acquiescence. (See Brief, p. 56 *et seq.*) There is no objection to deriving an executive authority by inference in this way, whether it be in aid of a statutory authority already existing, or independent of statute. Legislation, in the strict sense, may require some formal expression of the legislative will. But as we have seen (Brief, p. 18), the dispositions

by Congress concerning the public domain, especially the mere reservation of land in the public interest, do not involve legislation in that sense. If they did, the power to make such dispositions could not be delegated (Brief, p. 95). Any disposition or use of the public domain is lawful if Congress consents. The consent may be and usually is expressed in the form of a law, but the mere expression of it, whether formal or informal, is not in essence legislation. It is an expression by an owner of his will concerning his property, rather than the act of a lawmaker laying down a rule to govern the conduct of its subjects. Consequently, valuable rights and privileges in the public lands, which without the consent of Congress could not exist, have been held by this court to have passed to private individuals as the result of the notorious exercise thereof without congressional interference.

Thus, in *Buford v. Houtz*, 133 U. S. 320, in view of the long use, and the absence of any governmental prohibition, this court implied a license in the public to depasture the public lands. On page 326 of the opinion it is said:

The Government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.

Even the general rights to appropriate the public mineral land and minerals, and the water from the public streams, were conferred through the mere acquiescence of Congress, implied from its knowledge and its silence.

In *Atchison v. Peterson*, 20 Wall. 507, 512, the court said:

The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement.

See *Basey v. Gallagher*, *id.* 670.

In *Broder v. Water Company*, 101 U. S. 274, it was held that a right of way for a canal, dependent upon mere use, was not affected by a grant of part of the land over which it passed by the amended Central Pacific Railroad act of July 2, 1864. The opinion assumes that title to the land passed to the plaintiff under that act, recognizes that there was no act of Congress to confer the right of way before the act of July 26, 1866, but holds the right of way superior upon the ground that it became vested by governmental acquiescence before the railway grant occurred. Mr. Justice Miller observed (p. 276):

It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining opera-

tions and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a preexisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one.

If vested rights may accrue to individuals in this way, through the silence of Congress, may not an authority be deemed to accrue, in the same way, to the President of the United States to reserve public lands temporarily in the public interest ?

2. When one considers the wide variety of purposes to which the practice has extended, and the frequency of its exercise, always with the silent assent, and often with the express approval, of Congress, he must conclude that any attempt to confine its validity to particular reservations, or particular kinds of reservations, would be utterly vain. There is no principle upon which this can be logically done. As we have shown in our other brief, page 47 *et seq.*, reservations have been made for Indian occupancy, for military occupancy, for the public use of wood, timber, stone, and clay, for reservoir purposes, for bird protection, for projected national parks, for projected State parks, to enable Congress to grant land to a State for internal improvements, to enable Congress to grant land to a State through State selections, to enable Congress to

improve the law concerning the disposition of isolated tracts, to prevent frauds, etc. Frequently these reservations were approved by subsequent acts of Congress. All of the coal lands of Alaska were at one time withdrawn by the President; Congress, later, recognized his action. Water-power sites, phosphate land, coal land, asphalt land, gas land, and oil land have all been withdrawn, upon a tremendous scale. The withdrawals of oil lands from agricultural entry began some ten years before the act of June 25, 1910, was passed. And while all this process is going on we do not find a single note of disapprobation from Congress. The result is a general agency, so to speak. The Executive has assumed the right to make reservations whenever he deemed them advisable, for such public purposes as he considered proper. This is the right which Congress has recognized.

3. Even if the extensive practice of the last ten years or more were ignored, the present reservation, viewed as a reservation for a public use, would still fall fairly within the scope of the practice as it existed before.

(a) We have shown that the reservation is quite as closely allied to the President's statutory duties as are the military reservations. Indian reservations are analogous. No absolute necessity for an implication of authority attends these cases. The authority, however, may be implied, because it is harmless, convenient, and sometimes essential for the protection of the public interests, and a liberal construction is allowable in favor of the public.

(b) Little need be said of the defendants' suggestions that an immediate use must be in contemplation. As we have said, a future use may call for present protection as well as an immediate one. Reservation for future use may be quite as much required by the "exigencies of the public service" as reservation for immediate use. And it may be assumed as a matter of high probability that many of the past executive reservations occurred well in advance of the time of use.

(c) But it is urged that this reservation differs in that there was no right or intention to use the land without some further action by Congress.

The "exigencies of the public service," referred to by this court in *Grisar v. McDowell*, 6 Wall. 363, are not necessarily to be satisfied by such acts as the Executive is authorized to perform at the time when the exigencies arise. Some exigencies may be met by executive action alone, some by legislative action alone, and some only by a combination of both. If the exigency justifies the executive action *as far as that action goes*, the action will stand to that extent without regard to whether it could have gone further. If the military reservation considered in the *Grisar* case, instead of being made for immediate and permanent use, had been made tentatively, subject to the future action of Congress, it would have been none the less effective.

If, as this court held in that case, Congress has recognized the authority of the President to reserve lands for public use as the exigencies of the public

service require, the reason for the recognition must arise from the public interest in having the lands reserved, and the effect of the recognition is to make the President the judge of the necessity and to treat the process of reserving them as a legitimate executive function. The fact that the use in view may not be made without new legislation can have no bearing upon the existence of a public necessity for the use, nor affect the character of the act of reserving the lands.

VII.

The reservation should be upheld independently of the naval purpose.

To prevent fraud, injustice, and waste in the disposition of our national estate is in itself a high public purpose, and a reservation made with this object in view should be upheld if not in clear and unavoidable conflict with the will of Congress. We have shown that for a number of years it has been customary to withdraw vast areas in this way, and that Congress has never objected, but, in some cases, has actually approved. The act of June 25, 1910, though out of tenderness toward possible private rights it did not operate as a ratification, may properly be regarded as the culminating (though unnecessary) evidence of congressional acquiescence. In the light of all this, it may well be said that the practice was legitimated, if irregular in the beginning.

It is entirely misleading to speak of such an authority as though it meant in effect an independent power in the President to suspend and set aside the laws.

Laws in the proper sense can only be stayed or affected by other laws. Here, however, we have to deal with an act which is not strictly a law, but a mere offer of privilege. Prior to the enactment of the first mining law, in 1866, all minerals were reserved to the Government (defendants' brief, p. 111 *et seq.*), but notwithstanding that fact, we have seen mineral rights become vested in individuals through the mere silent acquiescence of Congress. In other words, the mineral land law and policy of the Government were altered, and, substantially, reversed, without an act of Congress. Surely it would require very little evidence of congressional consent to sustain the authority of the President now under discussion, especially when it is considered that the mining law is wholly consistent with the reservation of any amount of mineral land in the public interest. It is only by attributing to the President the purpose, and only the purpose, of defeating the mining law itself that his action may be made to wear the appearance of defying the will of Congress. But it is not credible that the mere temporary withholding of designated lands in order to prevent waste, fraud, and other newly ascertained abuses, until Congress might consider them, would be contrary to the intention of that body. The most that can be said is that Congress did not foresee such a situation and consequently did not provide for it when the mining law was passed. Therefore the temporary withdrawal, for the purposes indicated, would be objectionable, if at all, only

because not expressly allowed. We think that the public interest permits the implication of the authority to make such withdrawals, and that their propriety is established by the tacit approval of Congress.

CONCLUSION.

In this brief and in our opening brief the public use has been emphasized throughout, because we have thought that upon that ground the reservation may be readily and specifically sustained without a decision upon the broader question which we have just considered. All of the writers on mining law who touch upon the subject have conceded, either expressly or impliedly, the authority of the President to reserve mineral land for Indian and military purposes. (See 1 Snyder, secs. 189-192; Morrison, 14th ed., p. 388; Martin [1908], secs. 44, 46; Costigan, secs. 23, 24; Barringer and Adams, Vol. I, pp. 545, 547; Vol. II, pp. 568, 569; Lindley, Vol. I, sec. 181 *et seq.*, sec. 190 *et seq.*) There can be no serious question of the existence of that authority. But, once concede its existence, immediately it becomes impossible to say, judicially, where the power to reserve for public purposes must end. This fact, in connection with the broad practice of withdrawing lands for an indeterminate variety of purposes, and the strong negative and positive evidence of congressional approval, to our minds makes it evident that the remedy for an abuse, if any there be, of the executive authority should be by legislation and not by judicial interference. But in so far as this reservation may properly

be the subject of judicial scrutiny, it should be viewed from the public standpoint with due regard to its immense public importance, liberal presumptions should be allowed in favor of governmental convenience and in support of governmental action, and strict constructions should be avoided.

JOHN W. DAVIS,
Solicitor General.

ERNEST KNAEBEL,
Assistant Attorney General.

JANUARY, 1914.



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1913

No. **278**

THE UNITED STATES OF AMERICA,
Appellant,

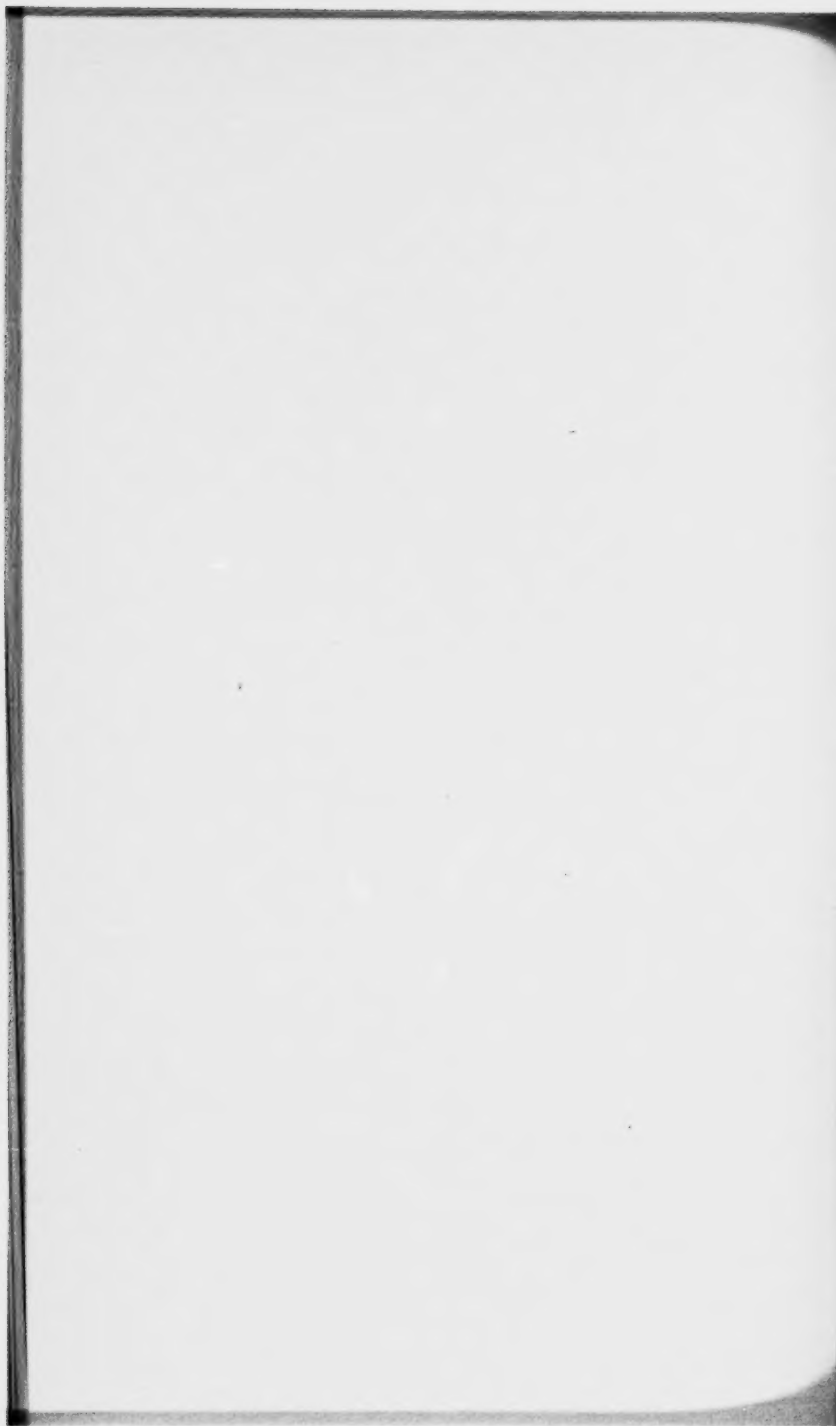
VS.

THE MIDWEST OIL COMPANY ET AL.,
Appellees.

On Record Certified to the Supreme Court from the United States
Circuit Court of Appeals for the Eighth Circuit on Appeal
from the District Court of the United States
for the District of Wyoming.

OPINION OF HONORABLE M. T. DOOLING,
U. S. District Judge,

in the case of The United States of America, Plaintiff, vs.
Midway Northern Oil Company (a corporation)
et al., Defendants, dated May 29, 1914.



In the Supreme Court
OF THE
United States

OCTOBER TERM, 1913

No. 750

THE UNITED STATES OF AMERICA,
Appellant,

VS.

THE MIDWEST OIL COMPANY ET AL.,
Appellees.

On Record Certified to the Supreme Court from the United States
Circuit Court of Appeals for the Eighth Circuit on Appeal
from the District Court of the United States
for the District of Wyoming.

OPINION OF HONORABLE M. T. DOOLING,
U. S. District Judge,

in the case of The United States of America, Plaintiff, vs.
Midway Northern Oil Company (a corporation)
et al., Defendants, dated May 29, 1914.

*"In the District Court of the United States, in and
for the Southern District of California,
Northern Division, Ninth Circuit.*

The United States of America, <div style="text-align: center;">vs.</div> Midway Northern Oil Company (a corporation), et al.,	} } }	Plaintiff, Defendants.	} } }	In Equity No. 47 Civil
---	-----------------------------	---	-----------------------------	---------------------------

MOTIONS TO DISMISS BILL.

The bill avers, in substance, that defendants subsequent to March 1st, 1910, entered upon the N. W. $\frac{1}{4}$ of Section 32, T. 12 N., R. 23 W., S. B. M., which was then, and ever since has been the property of plaintiff, and on June 6th, 1910, discovered therein petroleum in paying quantities; that on September 27th, 1909, the President regularly withdrew said land and the whole thereof from mineral exploration, and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws of the United States, and reserved the same for public uses, to wit: In order to secure a supply of fuel oil for the use of the navy, and that since said last mentioned date none of said land has been subject to exploration for minerals, or to the initiation of any right under any of the public land laws of the United States; that defendants are now extracting vast quantities of mineral oil

and petroleum from said lands, and committing waste and trespass thereon to plaintiffs' irreparable injury, and that defendants are so doing under the pretense that they have acquired valid mineral rights therein, by virtue of their entry upon said land and exploration and development thereof, and discovery of oil therein, but that by reason of such order of withdrawal of September 27th, 1909, such claim of right is unfounded. The bill asks for an injunction, a receiver, an accounting, and a decree that defendants have no estate, right or title to said land, or to any of the minerals contained therein, and that it be decreed that plaintiff has a perfect property in said land free and clear of any of the claims of defendants, and each and every of them.

The case turns upon the validity or invalidity of the executive withdrawal order of September 27th, 1909, which order is as follows:

"Temporary petroleum withdrawal No. 5."

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

The accompanying lists embraced 3,041,000 acres of land, 170,000 acres thereof being in Wyoming, and 2,871,000 acres in California. Included in this latter quantity is the land described in the bill.

It will be observed that while the bill declares the purpose of the withdrawal to have been to secure for the navy a supply of fuel oil, the order itself makes no such declaration, but states the purpose to be "In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain", and the history of the movement to secure such legislation indicates that the Executive was dissatisfied with the existing laws in regard to the disposition of petroleum deposits and hoped to have them changed. It may be added, too, that the bill as originally filed contained no reference to the use of oil by the navy, but that this averment was added by an amendment made on the very day that the motion to dismiss was called for argument, although the bill itself had been filed nearly a year before.

At the time of this withdrawal, and at the time of defendants' entry upon the land, there were in force, and still remain in force the following statutory provisions:

"That all valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * and that claims usually called 'placers' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

“ That any person authorized to enter lands under
 “ the mining laws of the United States may enter and
 “ obtain patent to lands containing petroleum or other
 “ mineral oils, and chiefly valuable therefor, under the
 “ provisions of the laws relating to placer mineral
 “ claims.”

It is under these statutes that defendants claim. The effect of the withdrawal order, if valid, was to suspend the operation of these statutes, at least to the extent of withholding their application to such portion of the 3,041,000 acres of land described as still remained a part of the public domain.

The Constitution, Article IV, Section 3, vests in Congress the power to dispose of and make all needful rules and regulations respecting territory or other property of the United States, and it was early decided that “the
 “ term territory as therein used is merely descriptive
 “ of one kind of property, and is equivalent to the word
 “ lands; that Congress has the same power over lands
 “ as over any other property belonging to the United
 “ States; and that this power is vested in Congress
 “ without limitation.” U. S. v. Gratiot, 14 Peters 526. The same proposition is differently, but no less forcibly stated as follows in other cases: “No appropriation of
 “ public land can be made for any purpose but by
 “ authority of Congress.” U. S. v. Fitzgerald, 15 Peters 407.

“ But public and unoccupied lands to which the United
 “ States have acquired title Congress, under the power
 “ conferred upon it by the Constitution, has the ex-
 “ clusive right to control and dispose of, as it has with

“ regard to other property of the United States.” *Van Brocklin v. State of Tennessee*, 117 U. S. 151.

“ The Constitution vests in Congress the power to
 “ “ dispose of and make all needful rules and regula-
 “ “ tions respecting the territory or other property be-
 “ “ longing to the United States’. And this implies an
 “ “ exclusion of all other authority over the property
 “ “ which could interfere with this right or obstruct its
 “ “ exercise.” *Wisconsin R. R. Co. v. Price County*, 133
 U. S. 496.

“ With respect to the public domain the Constitu-
 “ tion vests in Congress the power of disposition and
 “ of making all needful rules and regulations. That
 “ power is subject to no limitations. Congress has the
 “ absolute right to prescribe the times, the conditions
 “ and the mode of transferring this property, or any
 “ part of it, and to designate the persons to whom the
 “ transfer shall be made.” *Gibson v. Chouteau*, 13
 Wall. 92.

Congress therefore having the exclusive power to dispose of the land in question, and to make all needful rules and regulations in relation thereto, and having declared the minerals therein to be free and open to exploration and purchase and the land itself to occupation and purchase, under the placer mining laws, the operation of such laws should not be interfered with by any other department unless a clear authority exist for such interference. It is claimed by plaintiff that such authority does exist, having its basis in long acquiescence by Congress in the exercise by the Executive of the power to reserve public lands for public pur-

poses, and in the approval by Congress of the exercise of this power in many instances other than the one in question. It is also claimed that such authority inheres in the Executive under the Constitution, subject only to the paramount authority of Congress. Many times the Executive has withdrawn lands in the past, and many times Congress has either directly or indirectly approved such withdrawals. Many times too Congress has affirmatively authorized such withdrawals in advance of their making. The right to make such withdrawals has also frequently been passed upon by the courts in concrete and specific cases. In many instances such right has been upheld, in others it has not. An examination of the adjudicated cases upon this point, however, seems to me to indicate that in every instance where the right to make such withdrawals was upheld in the absence of congressional authorization, either direct or clearly to be implied, it was either because the lands withdrawn were actually devoted to a specific public purpose before the right of any third person had intervened, or because such withdrawal was necessary in order fully to effect the purposes of some existing law. An example will serve to illustrate each of these classes of cases.

In *Grisar v. McDowell*, decided by the Supreme Court in 1867, the question involved a military reservation which had been long occupied by the government for military purposes, and was indeed actually in the possession of the government and used for such purposes at the time the controversy arose, and the court said:

“ From an early period in the history of our govern-

"ment it has been the practice of the President to
 "order, from time to time, as the exigencies of the pub-
 "lic service required, parcels of land belonging to the
 "United States to be reserved from sale and set apart
 "for public uses. The authority of the President in
 "this respect is *recognized* in numerous acts of Con-
 "gress * * *. The action of the President in making
 "the reservations in question was indirectly approved
 "by the legislation of Congress in appropriating
 "moneys for the construction of fortifications and other
 "public works on them. The reservations made at the
 "same time embraced seven distinct tracts of land, and
 "upon several of them extensive and costly fortifica-
 "tions and barracks and other public buildings have
 "been erected." This case taken in its entirety does
 not seem to me to support the proposition that 3,000,000
 acres of land may be withdrawn by executive order
 from the operation of the laws enacted by Congress
 specifically providing for its disposition.

The so-called Des Moines River Cases will illustrate
 the second broad class of cases in which withdrawal
 orders have been upheld. In 1846, for the purpose of
 aiding to improve the Des Moines River from its mouth
 to Racoon Creek, Congress granted to the Territory
 of Iowa certain lands, being one equal moiety in alter-
 nate sections on a strip five miles in width on each side
 of said river. A doubt soon arose as to whether this
 grant carried any of the lands along the river above
 Racoon Creek, and the first Secretary having to do with
 the question was of the opinion that the grant did
 embrace such lands, and consequently reserved them

from sale in order to carry out the law as construed by him. The validity of such reservation was before the Supreme Court in several cases, in each of which it was upheld, the court saying in one of them: "Besides, "if this power was not competent, which we think it "was ever since the establishment of the Land Department, and which has been exercised down to the "present time, the grant of 8th August, 1846, carried "along with it by necessary implication, not only the "power, but the duty, of the land office to reserve "from sale the lands embraced in the grant * * *

"That there was a dispute existing as to the extent of "the grant of 1846 in no way affects the question. The "serious conflict of opinion among the public authorities on the subject made it the duty of the land office "to withhold the sales and reserve them to the United "States till it was ultimately disposed of." *Wolcott v. Des Moines Co.*, 5 Wall. 681. One of the grounds therefore upon which the reservation was held to be valid was the necessity of preserving intact the full measure of the grant, and to this extent at least the reservation was made in order that the provisions of the law, if it should ultimately be determined that the lands above Racoon Creek were embraced therein, might be put fully into effect.

It has been held in later cases that the Executive has no general power to withdraw lands from the operation of existing laws. In *Southern Pacific R. R. Co. v. Bell*, 183 U. S. 675, the court says:

"The power of the Secretary to withdraw lands is "exercised for the purpose of carrying out the grant "to the railroad, and to prevent lands covered by said

“ grant from being taken up by settlers before the road
 “ is completed and patents issued to the company; but
 “ clearly that power cannot be exercised to withdraw
 “ lands which are beyond the intended limits of the
 “ grant.” So in *Brandon v. Ard*, 211 U. S. 11, where
 a grant was made in March, 1863, an attempted withdrawal in May, 1863, and a homestead settlement in June, 1866, over three years later, and when the withdrawal order, if effective at all, had been over three years in effect, the court speaking also of indemnity lands says again:

“ We cannot give to the withdrawal from sale, pre-
 “ emption or settlement of the lands upon which Ard
 “ entered in 1866 the legal effect which the plaintiffs
 “ in error insist must be given to it. It is conceded
 “ that the lands were not within the place or granted
 “ limits of either railroad, but were within indemnity
 “ lands. The withdrawal of them from sale or settle-
 “ ment * * * prior to the definite location of the
 “ road, and before they were selected to supply defi-
 “ ciencies in place or granted limits, was without
 “ authority of law. Such unauthorized withdrawal did
 “ not stand in the way of Ard, in virtue of his settle-
 “ ment on them in 1866 under the then existing home-
 “ stead laws, from acquiring such an interest in the
 “ lands as would be protected against their subsequent
 “ selection by the railroad company.”

In a still later case the court again says:

“ A rejection upon the ground stated was not author-
 “ ized, for the Secretary of the Interior had no author-
 “ ity to withdraw from settlement lands within the
 “ indemnity limits of the grant which had not been

"before selected and approved by him." *Osborn v. Froyseth*, 216 U. S. 571.

It is clear therefore that no general power of withdrawal exists, and while withdrawal orders have been very frequently upheld, I find no case broad enough to cover the withdrawal of over 3,000,000 acres of land from the operation of the mineral land laws whether "in aid of proposed legislation" as stated in the order, or for the purpose of securing a supply of fuel oil for the navy as stated in the bill. I am fully aware of the importance of this and kindred cases because of the magnitude of the interests involved. But they are still more important because of the legal principles upon which they must be determined. The effect of the order of withdrawal of September 27th, 1909, whatever its purpose, was practically to suspend the operation of the mineral laws as applied to the petroleum deposits in the public domain. If such power exist, plaintiff should be able to point to some clear legislative or constitutional provision upon which it rests. I am not content to seek for it in the dicta of decisions, or in some shadowy twilight zone lying between the powers expressly granted to the Congress and the powers expressly granted to the President. The power to dispose of the public lands has been given to the Congress by the Constitution, and I find no conflicting power granted the President by that instrument derogatory to the power given the Congress in this regard. The Congressional will as to these lands is clearly expressed in the laws above cited, and the right to nullify this will is not lodged in either the executive

or judicial department. On the contrary it is equally the duty of the executive as of the judicial department to see that this will is carried into effect. The promulgation of the order in question I believe to be but one manifestation of a growing tendency to concentrate in the Executive more of power than can be traced to any specific constitutional or legislative provision. As this tendency in the present instance leads to an encroachment upon the domain of the Congress, I am unwilling to further it by any decree of this court, and for this reason it is ordered that the application for an injunction and a receiver be denied, and the bill itself dismissed.

May 29th, 1914.

M. T. DOOLING,
Judge."

RECEIVED
JAN 10 1912
U.S. DEPT. OF JUSTICE
RECORDS DIVISION

12-221

SUPREME COURT OF THE UNITED STATES

January Term, 1912

No. 278

UNITED STATES APPELLATE COURT

THE MIDWEST OIL COMPANY ET AL. APPELLANTS

VERSUS
THE UNITED STATES OF AMERICA

J. S. PHILSON
CLERK
ALMA S. BROWN
ALEXANDER BRITTON
FRANK BROWN
FRANCIS W. CLEMENTS

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 750.

UNITED STATES, APPELLANT,

v.

THE MIDWEST OIL COMPANY ET AL., APPELLEES.

BRIEF FOR AMICI CURIAE BY PERMISSION OF THE
COURT.

It would be idle to traverse the phases of this case discussed in the complete briefs filed by counsel of record. We have asked leave to file this brief as *amici curiae* for the purpose of respectfully directing the court's attention to only one or two points.

SCOPE OF WITHDRAWAL ORDER OF SEPTEMBER 27, 1909, AS
NOT INHIBITING OCCUPATION AND EXPLORATION OF
MINERAL DEPOSITS IN LANDS BELONGING TO THE UNITED
STATES.

By Section 2319, U. S. R. S.:

"1. All valuable mineral deposits in lands *belong-*
ing to the United States, both surveyed and unsur-
1s

"veyed, are hereby declared to be free and open for
"exploration and purchase."

"2. And the lands in which they are found to oc-
"cupation and purchase."

Thus the right is granted to occupy for exploration and for exploitation of the mineral deposits without declared intention to acquire title in the lands in which the deposits occur.

"It is very true that Congress has, by statutes and
"by tacit consent, permitted individuals and cor-
"porations to dig out and convert to their own use
"the ores containing the precious metals which are
"found in the lands *belonging to the Government*,
"without exacting or receiving any compensation
"for those ores, and without requiring the miner to
"buy or pay for the land."

Forbes vs. Gracey, 94 U. S., 762, 763.

Sections 2320 and 2335, U. S. R. S., specify the manner of initiating a claim and perfecting title to mineral ground. The first step in the proceeding looking to title is *location* of the ground claimed, but "no *location* of a mining claim "shall be made until the discovery of the vein or lode within "the limits of the claim located." Section 2320, U. S. R. S.

Even where title is sought occupation and exploration leading to discovery of the mineral substance must occur before location. This clear distinction between (1) the right of occupation and exploration of *mineral deposits*, and (2), the right to purchase or enter *mineral ground* must be kept in mind when the scope and effect of the withdrawal order of September 27, 1909, is considered. For this purpose the power and authority to make the order may be conceded *arguendo*; only the scope and extent of the order are in question.

The order, omitting the list of lands, reads:

"In aid of proposed legislation affecting the use and
"disposition of the petroleum deposits on the public
"domain, all public lands in the accompanying lists

“are hereby temporarily withdrawn from all forms
 “of location, settlement, selection filing, entry, or
 “disposal under the mineral or non-mineral public-
 “land laws. All locations or claims existing and
 “valid on this date may proceed to entry in the usual
 “manner after field investigation and examination.”

In the first place the order does not by its terms include the mineral *deposits* in the lands named. Occupation or exploration for such *deposits* is not attempted to be withheld, if indeed this would have been possible, for by section 2319, U. S. R. S., the right of exploration for valuable mineral *deposits* is granted not only in the *public* lands, but “in *lands belonging to the United States.*” To concede the power to withdraw the *lands*, merely concedes the power to withhold *them* from sale or disposition. As before shown, exploration and even exploitation may be made of valuable mineral *deposits* “in *lands belonging to the United States*” without a purpose on the part of the occupant to acquire title to the ground in which the deposits are found, and since the *lands*, even after withdrawal from purchase, do not cease to *belong* to the United States, this conclusion cannot be affected by such withdrawal.

How then can this order be construed as affecting the right of the prospector to explore and even exploit the valuable mineral deposits in the *lands belonging to the United States*?

The order of September 27, 1909, states its purpose to be “in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain.” While there has been no legislation since the said order specifically “affecting the use and disposition of the petroleum *deposits on the public lands.*” Congress has, however, on the initiative of the Executive, who made the order, legislated respecting the matter of withdrawal of public lands.—Act of June 25, 1910.

By the provisions of section 2 of that act the distinction hereafter made between the right of occupancy for explora-

tion and discovery of the mineral *deposits* and the right to purchase the mineral *ground* is clearly recognized.

Section 2 of that act in providing "that all lands with-
"drawn under the provisions of this act shall at all times be
"open to *exploration, discovery, occupation* and *purchase*,
"under the mining laws of the United States, so far as the
"same apply to minerals other than coal, oil, gas and phos-
"phates," clearly withholds *all* such rights so far as the
same apply to deposits of coal, oil, gas and phosphates in
lands "withdrawn under the provisions of this act."

We confidently urge, therefore,

1. That the order of September 27, 1909, did not prevent nor attempt to prevent occupation of the lands and exploration for mineral *deposits*, and

2. That until the act of June 25, 1910, no withdrawal of the mineral *deposits* in lands *belonging* to the United States from occupation and exploration was possible.

CONGRESSIONAL AUTHORITY, EXPRESS OR IMPLIED, OR AT
LEAST CONGRESSIONAL ACQUIESCENCE, MUST LIE BACK
OF EVERY EXECUTIVE ORDER OF WITHDRAWAL.

The question whether or not by precedent and practice the Chief Executive may exercise the power of withdrawal is elaborately presented in the briefs. It is not disputed that to Congress belongs the power "to dispose of and make all needful rules and regulations" respecting the public lands. While something is said of the inherent power of the President to reserve public lands, no authorities are cited in support of such power, and it is apparently conceded that congressional authority, or at least congressional acquiescence, must lie back of every Executive order of withdrawal. The authorities cited in the brief for the appellant proceed on that assumption. Sometimes the authority is claimed to be found in an express congressional grant, sometimes in legislation in aid of an order already made, sometimes in an expressed or implied ratification. But always, under the

theory and language of the decisions relied upon by the appellant, there must be congressional authority, however deduced. Thus, for example, in *Grisar vs. McDowell* (6 Wall., 363) the court's dictum as to the Executive power to reserve lands is, in part, supported by the statement that "the action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them."

So Attorney General MacVeagh, in the language quoted by appellant from his opinion (17 Op., 160), said: "Hence in reserving and setting apart a particular piece of land for a special public use, the President must be regarded as acting by authority of Congress." So, too, the opinions of Assistant Attorney General Van Devanter (29 L. D., 32), of Attorney General Miller (19 Op., 371), and of Attorney General Brewster (17 Op., 258), as shown by the language quoted by appellant, are based on the same theory.

Now the point here is that the congressional sanction, express or implied, without which there is no semblance of support to appellant's argument, was in this case denied.

Whatever may be claimed as to previous executive reservations, the consent of Congress to this order was expressly withheld. An implied authority cannot, it is submitted, be deduced where express consent is refused. In this case it was originally proposed that Congress should approve the order of September 27, 1909. The bill, which was afterwards known as the Pickett act, and which became a law on June 25, 1910, as it originally passed the House, contained a provision ratifying "all withdrawals heretofore made." (See Appendix, Exhibit 1.)

This provision of the bill was directly responsive to the message of the President, who urged upon Congress the approval of his order. The portion of the message dealing with the subject was much discussed in the debate on the bill (Congr. Rec., 61st Cong., 2d session, vol. 45, pt. 5, p. 5090), and is as follows:

"The power of the Secretary of Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statute would be detrimental to the public interests, is not clear or satisfactory. This power has been exercised in the interests of the public with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions. Unfortunately Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to validate the withdrawals which have been made by the Secretary of the Interior and the President, and to authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet the conditions of emergencies as they arise."

The proceedings of the House on the date of the passage of the bill (April 20, 1910) demonstrate the purpose at that time to confirm the order here in question. The author of the bill said:

"Mr. Chairman, within the limited time at my disposal I can only refer briefly to the main issue presented by the committee bill, the substitutes set forth in the minority reports, and which will, I am informed, be offered, and the more important amendments suggested during the progress of the debate.

"The two important propositions contained in the bill are, first, conferring upon the President authority to make withdrawals of public lands for the purposes named, to wit, for public uses, for examination and classification, and when in his judgment public interest requires it to conserve the resources of our public domain, and, second, ratifying the withdrawals heretofore made."

(Congr. Rec., *ibid.*, 5088.)

And the bill (H. R. 24070) went to the Senate with the desired clause of ratification.

But the Senate committee in charge of the bill struck out the clause. (Appendix, Exhibit 2.) At the same time the President's doubts as to the validity of the order were shared both in the House and Senate. Many Members and Senators considered the withdrawal unquestionably void. Thus Senator Borah, in the debate on June 7, 1910, when the Senate amendments were under discussion, said:

"I agree perfectly with the Senator from Wyoming in his legal proposition that these withdrawals have been without authority of law; that they were in violation of law."

(Congr. Rec., 61st Congress, 2d session, vol. 45, pt. 7, p. 7543.)

Nevertheless the Senate amendments, including that which struck from the bill the confirmation of the order, were concurred in by the House, and the bill, as returned to the House (Appendix, Exhibit 2), became a law.

The history of the act and disposition of the amendments which were offered to it are all matters germane to the intent of Congress and of judicial cognizance.

U. S. vs. Alexander, 12 Wall., 177.

U. S. vs. Burr, 159 U. S., 78.

Butterfield vs. Stranahan, 192 U. S., 470.

Jennison vs. Kirk, 98 U. S., 453.

Holy Trinity Church vs. U. S., 143 U. S., 457.

Thus, *e. g.*, in *U. S. vs. Alexander*, it was contended that the pension grant contained in the act of Congress of February 23, 1853, was effective from and after March 4, 1848. This court, in holding to the contrary, considered an amendment proposed to the act before its passage, and said:

"And this is made quite certain by the history of the legislation. The act of 1855, when first proposed, contained the following provision: 'And the pensions granted by this act, and those under the said section of the act of February 3d, 1853, shall commence on the fourth day of March, 1848.' This provision was

intended to change the construction which the Commissioner of Pensions had given to the act of 1853, but it was stricken out, and the statute was enacted as it now stands. The intention of Congress was thus clearly manifested to adopt the construction of the act of 1853, which had been given to it by the Pension Bureau, and we are hardly at liberty now to interpret it differently."

Not only the history of the enactment of the statute approved June 25, 1910, but the provisions of the act, completely negative the existence of congressional assent to the order of September 27, 1909.

That order provided that—

"in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

But no authority is conferred by the act of June 25, 1910, for a withdrawal "in aid of proposed legislation." The power given to the President by that statute is to reserve lands "for water-power sites, irrigation, classification of lands or public purposes to be specified in the order of withdrawals." *Expressio unius est exclusio alterius*. Bearing in mind that the order of September 27, 1909, was constantly before Congress in the enactment of the statute of June 25, 1910, there is a studious avoidance in that act of any authority for, or approval of, a withdrawal "in aid of proposed legislation."

Still bearing in mind that the President's message requested ratification and approval of the Executive withdrawal of September 27, 1909, and that that withdrawal specified no public purpose, it is of marked importance that the act of June 25, 1910, requires that the exercise of the

President's power to withdraw must be accompanied by a specification of the purpose in the order of withdrawal. It is conceded that there is no statute conferring upon the Chief Executive the power generally to reserve lands, and the only general act of Congress on the subject is that of June 25, 1910. Measured by that statute, no withdrawal, past or future, could be valid unless the purpose thereof is specified therein.

Again, the act of June 25, 1910, expressly provides that all lands withdrawn by the President shall be open to exploration, discovery, occupation and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals. (Act of June 25, 1910, amended by act of August 24, 1912.) The order of September 27, 1909, on the contrary, withdrew the lands from all forms of location, entry or disposal under the mineral laws.

The withdrawal order reserved the land from all forms of settlement, selection, filing, entry or disposal under the mineral or non-mineral public land-laws. The act of June 25, 1910, on the contrary, provides that there shall be excepted from the force and effect of any withdrawal made under the provisions of the act, lands which at the date of such withdrawal are "embraced in any lawful homestead or desert entry theretofore made or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law." According to the terms of the withdrawal of September 27, 1909, no lawful homestead or desert entry or valid settlement could be made, or, if made, perfected, on any of the lands described in the order. Under the act of June 25, 1910, all such homestead or desert entries or other valid settlements could, on the contrary, be made up to the time of a withdrawal made pursuant to the statute.

The order of withdrawal provides that all locations or claims existing and valid at the date thereof may proceed to entry, and, by implication, purports to cut off the right of

purchase under the mining laws, of an occupant whose possession had not ripened into a location or claim. The act of June 25, 1910, on the contrary, expressly provides that the rights of a *bona fide* occupant or claimant of oil or gas-bearing lands, complying with the provisions of the statute, shall not be affected or impaired by a subsequent order of withdrawal.

In all these respects the provisions of the order of September 27, 1909, not only failed to receive congressional authority, but are directly contrary to the expressed will of Congress.

Again, section 2320, R. S., provides:

"But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Clearly, therefore, no right of purchase is acquired, nor is any claim in fact initiated under the mining laws as against the United States prior to actual discovery of a valuable mineral deposit within the limits of the claim located. However, by section 2 of the said act of June 25, 1910, it was provided that one in the *bona fide* occupation of oil or gas bearing land without *previous discovery* but in diligent prosecution of work thereon at date of withdrawal "shall not be affected or impaired by such order" so long as he shall diligently prosecute the work towards actual discovery, and this protection or grant of right was specifically made applicable to the lands attempted to be previously withdrawn by Executive order. Congress therefore not only withheld its assent to or acquiescence in the previous executive withdrawal of mineral lands, all of which claims would have been terminated had such assent been given, but, on the contrary, conferred rights upon these inchoate claims, even as against a possible recognition of such withdrawal by the courts. Finally, this act also expressly provides that it shall not be construed as a

recognition, abridgment or acknowledgment of any "asserted rights" or "claims" upon oil or gas bearing lands after a withdrawal made *prior* to the passage of the act, though such asserted rights or claims would obviously be in derogation of the prior executive withdrawal.

Thus there is no congressional assent, express or implied, to be found to support the executive withdrawal of September 27th, 1909. Congressional assent to or acquiescence in that withdrawal was purposely withheld in the passage of the act of June 25th, 1910, the express provisions of which are not only repugnant to the terms of the order for such withdrawal, but to the purpose and effect thereof surely as applied to the rights of mineral claimants.

E. S. PILLSBURY,
OSCAR SUTRO,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
FRANCIS W. CLEMENTS.

APPENDIX.

EXHIBIT 1.

61ST CONGRESS,
2D SESSION.

H. R. 24070.

IN THE SENATE OF THE UNITED STATES.

April 21, 1910.

Read twice and referred to the Committee on Public Lands.

AN ACT

To authorize the President of the United States to make withdrawals of public lands in certain cases.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assem-*
- 3 *bled,*
- 4 That the President be, and he hereby is, authorized to
- 5 with-
- 6 draw from location, settlement, filing, and entry areas of
- 7 public lands in the United States, including the Dis-
- 8 trict of
- 9 Alaska, for public uses or for examination and classifi-
- 10 cation
- 11 to determine their character and value; and the Presi-
- 12 dent is
- 13 further authorized, when in his judgment public in-
- 14 terest

- 9 requires it, to withdraw from location, settlement, filing,
and
10 entry areas of public lands in the United States, includ-
ing the
11 District of Alaska, whether classified or not, and sub-
mit to
12 Congress recommendations as to legislation respecting
the
13 land so withdrawn.

2.

- 1 SEC. 2. That the Secretary of the Interior shall re-
port
2 all withdrawals made under the provisions of this Act to
3 Congress at the beginning of its next regular session
after
4 date of the withdrawals, specifying the purposes of each
5 thereof. All withdrawals heretofore made and now
existing
6 are hereby ratified and confirmed as if originally made
under
7 this Act. All withdrawals shall remain in force until re-
8 voked by the President or by Congress.

Passed the House of Representatives April 20, 1910.

Attest:

A. McDOWELL, *Clerk.*

(Endorsed:)

2D SESSION. }
61ST CONGRESS }

H. R. 24070.

APPENDIX EXHIBIT 2.

Calendar No. 553.

61st Congress, 2d Session.

H. R. 24070.

In the Senate of the United States.
April 21, 1910.Read twice and referred to the Committee on Public Lands.
April 23, 1910.Reported by Mr. Smoot, with an Amendment.
May 26, 1910.Ordered to be reprinted with new amendment in lieu of
amendment previously reported.(Strike out all after the enacting clause and insert the part
printed in italics.)

AN ACT.

To authorize the President of the United States to make
withdrawals of public lands in certain cases.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assem-*
- 3 *bled,*
- 4 ~~That the President be, and he hereby is, authorized to~~
- 5 ~~with—~~
- 6 ~~draw from location, settlement, filing, and entry areas of~~
- 7 ~~public lands in the United States, including the Dis-~~
- 8 ~~trict of—~~
- 9 ~~Alaska, for public uses or for examination and classifi-~~
- 10 ~~cation—~~
- 11 ~~to determine their character and value; and the Presi-~~
- 12 ~~dent is—~~

8 further authorized, when in his judgment public interest
 9 requires it, to withdraw from location, settlement, filing,
 and—
 10 entry areas of public lands in the United States, includ-
 ing the

2

1 ~~District of Alaska, whether classified or not, and sub-~~
~~mit to~~
 2 ~~Congress recommendations as to legislation respecting~~
~~the—~~
 3 ~~land so withdrawn.~~
 4 ~~Sec. 2. That the Secretary of the Interior shall report~~
 5 ~~all withdrawals made under the provisions of this Act to~~
 6 ~~Congress at the beginning of its next regular session~~
~~after—~~
 7 ~~date of the withdrawals, specifying the purposes of each~~
 8 ~~thereof. All withdrawals heretofore made and now~~
~~existing.~~
 9 ~~are hereby ratified and confirmed as if originally made~~
~~under—~~
 10 ~~this Act. All withdrawals shall remain in force until re-~~
 11 ~~voked by the President or by Congress.~~
 12 That the President may, at any time in his discretion,
 tem-
 13 porarily withdraw from settlement, location, sale, or
 entry
 14 any of the public lands of the United States and the
 Territory
 15 of Alaska and reserve the same for water-power sites,
 irriga-
 16 tion, classification of lands, or other public purposes to be
 17 specified in the orders of withdrawals, and such with-
 draws
 18 or reservations shall remain in force until revoked by
 him or
 19 by an Act of Congress.

20 SEC. 2. That all lands withdrawn under the pro-
 21 visions
 22 of this Act shall at all times be open to exploration, dis-
 23 covery,
 24 occupation, and purchase, under the mining laws of the
 25 United States, so far as the same apply to minerals other
 than
 coal, oil, gas, and phosphates: *Provided*, That the
 rights of
 any person who, at the date of any order of withdrawal

3

1 heretofore or hereafter made, is a *bona fide* occupant
 or claim-
 2 ant of oil or gas bearing lands, and who, at such date,
 is in
 3 diligent prosecution of work leading to discovery of oil
 or gas,
 4 shall not be affected or impaired by such order, so long
 as such
 5 occupant or claimant shall continue in diligent prosecu-
 tion of
 6 said work: *And provided further*, That this Act shall
 not be
 7 construed as a recognition, abridgement, or enlargement
 of any
 8 asserted rights or claims initiated upon any oil or gas
 bearing
 9 lands after any withdrawal of such lands made prior
 to the
 10 passage of this Act: *And provided further*, That there
 shall
 11 be excepted from the force and effect of any withdrawal
 made
 12 under the provisions of this Act all lands which are,
 on the

13 date of such withdrawal, embraced in any lawful home-
 14 stead
 15 or desert-land entry theretofore made, or upon which
 16 any
 17 valid settlement has been made and is at said date being
 18 maintained and perfected pursuant to law; but the
 19 terms of
 20 this proviso shall not continue to apply to any particu-
 21 lar tract
 22 of land unless the entryman or settler shall continue to
 23 com-
 24 ply with the law under which the entry or settlement
 was
 made: *And provided further*, That hereafter no forest
 reserve
 shall be created, nor shall any additions be made to
 one here-
 tofore created within the limits of the States of Oregon,
 Wash-
 ington, Idaho, Montana, Colorado, or Wyoming, ex-
 cept by
 Act of Congress.

4

1 SEC. 3. That the Secretary of the Interior shall report
 2 all such withdrawals to Congress at the beginning of its
 3 next
 regular session after the date of the withdrawals.

Passed the House of Representatives April 20, 1910.

Attest:

A. McDOWELL, *Clerk.*

16
Office Supreme Court, U. S.

FILED

MAY 7 1914

JAMES D. MAHER
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1913

No. ~~2~~ 278

UNITED STATES, Appellant,

vs.

THE MIDWEST OIL
COMPANY, ET AL, Appellees.

BRIEF FOR AMICUS CURIAE BY PERMISSION
OF THE COURT.

FRANK H. SHORT



IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Appellant,

vs.

MIDWEST OIL COMPANY, a Corporation, Appellee.

BRIEF SUBMITTED TO BE FILED AMICUS CURAIE

By FRANK H. SHORT

In view of the able and exhaustive briefs that have been filed and the able arguments that have already been made and those that are to be made in this case, counsel, appearing as a friend of the Court, would not presume to ask to be heard in any way or to any extent to cover the arguments or authorities in support of the doctrine that the withdrawal orders here under consideration are void. However, the professional duties and labors of counsel have in certain respects been along certain lines that are applicable to the questions before the Court, and for this reason it is felt that counsel may be of some assistance to the Court in pointing out, as briefly as can be done, a few and only a few of the fundamental considerations that it is felt should be applied to the decision of this case.

Counsel asking leave to file this brief represents a considerable number of oil locators, developers and operating companies that are and will be affected by the decision of the case, and therefore, and in view of these considerations and the reasons above stated, asks briefly to be heard.

It will be assumed that the authorities, pro and con, upon this question have been completely presented and completely argued, and in making these suggestions we will approach the subject with the view, and will undertake to sustain the same by argument, that upon fundamental considerations of the Constitution, based upon its express provisions and by the

literal terms of the withdrawal order under consideration, the order in question is clearly in excess of the powers of the President, and void.

For these reasons we shall not here pause to discuss the previous orders of withdrawal or the considerations upon which they were sustained or rejected, but shall submit that the withdrawal order under consideration is directly and frankly not in the exercise, or attempted exercise, of any of the powers, discretionary or otherwise, of the President, and which in certain cases have heretofore been held to justify the withdrawal by the President of certain public lands for public purposes. But the point will be made that this withdrawal is in no way analogous to any of said previous withdrawals, and is as stated, frankly and directly contrary to the laws of Congress and the powers of the President.

The substance of what is here said was contained in an argument delivered before the Honorable Maurice T. Dooling, District Judge for the Ninth Circuit, sitting in the Southern Division of California, and the suggestions there made are here repeated in somewhat abbreviated form, and as was then stated and as here repeated, were not made for the purpose of covering the arguments that might be made in the case, pro and con, but for the purpose of the definite statement of certain principles which we believe to be controlling.

In the course of this argument it will be assumed that there is no disagreement upon the proposition that the power of the President to withdraw lands, unless it be one of his inherent powers under the Constitution, must find support in and must not be in conflict with any act of Congress.

**FIRST WE SUBMIT THAT THE PRESIDENT HAS NO INHERENT
POWER WHATSOEVER UNDER THE CONSTITUTION
PERTAINING TO THE PUBLIC LANDS**

In this connection it can be necessary only to suggest to this learned tribunal certain elementary and well understood considerations which we would deem it unnecessary to mention at all except for the purpose of presenting their application in this connection.

It will be borne in mind that under the Federation, the general government, under the compact between the colonies, had not control over or interest in the public lands. That

these lands, in so far as they were then owned or controlled, were severally owned and controlled by the states or colonies. It will also be borne in mind that even during the formative period of the Constitution, it was for a considerable part of the period undecided as to whether these public lands should go to the federal government or should remain in the several states. It might well have been, and for a time it was thought that it would be decided that all of these lands should remain with the states, and in that event the public lands would not, nor would any of the questions appertaining thereto, have had any place in our scheme of government, nor any part in the interpretation of the Constitution or of federal laws. The states would simply have remained the sovereign proprietors of these lands, the federal government having no interest therein or control thereover.

During the period of the preparation and adoption of the Constitution, the question as to whether the public lands should remain in the states or should be transferred to the federal government was perhaps the most prominent single source of difference and difficulty. The great public land owning states, such as Virginia, very naturally and very firmly adhered to the idea that they should continue with the states. The non-owning states, such as Maryland, fearing the ascendancy, superior power and wealth of the land owning states in the event they continued such ownership, with equal earnestness, insisted that they should be assigned to the federal government. And it appeared, for a time, that these deep-seated differences might have the effect to interfere with and prevent the successful formation of the American Union.

While this great controversy, for reasons later pointed out, has not been prominent in the history of this country, legally or otherwise, there was no other question more prominent in the making of the federal compact, and no other question came so near dividing the states and preventing the adoption of the Constitution.

The statesmanship and ability with which the subject was handled is illustrated by the fact that the State of Virginia, one of the greatest land owning states, was represented upon this question and in the negotiations which led to its settlement, by Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe.

While then, as now, self interest was a powerful argument, it did not prevail, and the conferences and negotiations were finally concluded by the several land owning states ceding to the federal government their publicly owned lands. This was done pursuant to the well-defined public policy covered by public documents and congressional enactments in substance to this effect, that the federal government should become the proprietor of the public lands in trust for the several states and for the people. That these lands should be disposed of at nominal prices in aid of the settlement of the Revolutionary war debt, and to meet the urgent necessities of the federal government. And that as soon as might be done, all of these lands should be passed to actual settlement and that over these lands there should be erected new states, equal in all respects whatsoever to the original states of the Union.

History does not disclose that any governmental question was ever broached with greater seriousness, discussed with greater ability, or settled with greater patriotism, than this great question.

In contemplation of this, it is a matter of consolation and pride to observe that for at least one hundred years after the adoption of the Constitution, the federal government was so faithful to this trust, so swift and zealous in carrying it out in letter and in spirit, that there arose few and unimportant controversies concerning this trusteeship, and after certain questions of governmental and state sovereignty had been settled, the federal government proceeded with such expedition and liberality to carry out the compact and policy under which it received the public lands that the importance of the controversy, the statesmanship involved in its settlement, and its difficulties and advantages, were largely buried and forgotten in the archives of the government.

The public lands of all of the states were conveyed to the federal government, and the sole fundamental provision with respect thereto is embodied in the following paragraph of Article IV of the Constitution, under the heading, "THE STATES AND THE FEDERAL GOVERNMENT:"

"CONTROL OF PROPERTY AND TERRITORY OF THE UNION.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so

construed as to prejudice any claims of the United States, or of any particular State."

The word "territory" has always been construed as referring to the public lands.

It is here of interest and importance to note that while by the Constitution the subject of the control and disposition of the public lands could have been committed to the federal government as such, or could have been committed solely to the Executive Department of the government, it was committed solely to the Congress. While in all of the general scope and functions of the government under the Constitution, the Executive has and exercises inherent or implied constitutional power, with respect to the public lands, it cannot be claimed that he has any constitutional or inherent powers whatsoever.

The power of control and disposition over the public lands was doubtless conferred in its solidarity upon Congress for the reason that each of the states was there represented and could there be heard, whether it should be in the Senate as states or in the House of Representatives, speaking for the people of the several states.

Therefore, in their wisdom, the makers of the Constitution did not commit this trust to the President or to the Executive branch of the government, but solely and only to the Congress representing all of the states and all of the people, where, it was rightly inferred no sectional, exceptional or local views would be predominant.

It is well to observe in passing that even the Congress, in handling and disposing of the public lands, were not to do so under general laws passed as such, but were to "make all needful rules and regulations representing the territory or other property belonging to the United States."

We may further assume that it could not reasonably be doubted that the Congress might, by these rules and regulations, have provided for its own Administrative Department, under these rules, to have charge of and attend to the management and disposition of these lands. Had Congress chosen to pursue this policy, the question of the right of the President to exercise any authority in this connection at all could have arisen only upon the contention that such rules and regulations were equivalent to laws, and that the provisions under the powers of the President that "He shall take care that

6 UNITED STATES OF AMERICA VS. MIDWEST OIL COMPANY

the laws be faithfully executed, etc.," would have included these rules and regulations. We think it may be assumed without much doubt that in the event of such procedure and action on the part of Congress that this implied power would not even have been claimed, much less could it have been supported.

However, we do not deem this theoretical question of any importance requiring discussion, since under either or any view it is clear beyond argument that all of the constitutional power was vested in Congress, and under any view or construction the President or Executive Department could exercise no powers over or pertaining to the public lands except under a law or a rule or a regulation of Congress. In the absence of any such law, rule or regulation, it could not be claimed that the President or the Executive Department would or could exercise any constitutional or implied powers, or have any control or authority over the public lands whatsoever. And this being the inevitable conclusion, we need not digress to discuss a subject that cannot here arise.

However, in its wisdom, the Congress, to the end that there might be an undivided authority and solidarity in connection with the administration of all the laws, rules and regulations of Congress, has, with practical uniformity, committed the administration of its laws, rules and regulations concerning the public lands to the President or to the Executive branch of the government so that they have been administered as other laws have been administered and enforced. Not, however, it will be observed, under the silent, implied authority of the Constitution, but under constantly repeated acts and provisions carried into the laws, rules and regulations of Congress.

In concluding this suggestion we may, therefore, submit that the only powers which the President or the Executive Department of the government may exercise must of necessity be derived through and under and by virtue of some rule, regulation or act of Congress, and that in the absence of any rule, regulation or act of Congress, and to be enforced or carried into effect, neither the President or any part of the Executive branch of the government have any powers over or in connection with the public lands, express, implied, or otherwise.

The United States is the proprietor of the public lands. It

has, as a government, of its own initiative, the power to protect its property, to prevent unlawful invasions or trespasses upon the same, and especially in connection with the public land laws it has always been the reiterated policy of Congress to confer expressly upon the President or the Executive branch of the government the power and duty to protect the public lands from trespass, or invasion, or fraudulent acquisition, and by suitable acts of Congress these matters of right have been appropriately covered and provided for and the powers of the Executive and the duties of that Department have been made sufficiently clear and well understood.

It would not, therefore, appear to us that the decisions cited and which hold that the President or his subordinate officers in the Executive Department of the government had the power and the duty, under the laws of Congress, to protect all such proprietary rights, to bring or cause to be brought all proper criminal and civil actions and enforce these proprietary rights and the laws, rules and regulations of Congress would have even colorable significance in this controversy, because we are here not only not considering the enforcement of any proprietary right or any law, rule or regulation of Congress, but we are actually considering and considering only the question of the suspension of a law of Congress by the President.

It would be a far cry, we may here suggest, between such decisions and such construction, and a decision and a construction that not only without a law, rule or regulation of Congress, but in suspension of such law, the President would have the power to act, and his action in that regard would be upheld. If the situation, under the circumstances, is the precise legal antithesis of the other, we would not be able to understand how any relation or similarity could be suggested; but the antithesis seems to us to be perfect.

In the right of these fundamental and undeniable considerations, we wish to proceed to consider precisely what the withdrawal order of the President under consideration is; to what it is directed; and what is its effect, and to submit

THAT THE WITHDRAWAL ORDER OF THE PRESIDENT HERE UNDER CONSIDERATION HAS NO POSSIBLE RELATION TO ANY CONSTITUTIONAL POWER OF THE PRESIDENT, AND IS NOT ONLY NOT CLAIMED TO BE SUPPORTED BY ANY ACT OF CONGRESS, BUT IS FRANKLY IN SUSPENSION OF SUCH ACT.

8 UNITED STATES OF AMERICA VS. MIDWEST OIL COMPANY

The particular act of Congress here under consideration would seem to be about as explicit and mandatory as a law could well be made. Section 2319 of the Revised Statutes reads as follows:

“MINERAL LANDS OPEN TO PURCHASE BY CITIZENS.

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.”

Under this act, the declaration of Congress, until title passes from the United States, is continuous and comprehensive. The declaration is that they shall “be free and open to exploration and purchase, etc.”

It is not questioned that under the act of February 11, 1897, (Revised Statutes, Vol. 2, page 1434), the lands in question are in the same category as other mineral lands and are subject to similar exploration, discovery, entry and purchase.

By some inexplicable confusion of thought, those who have attempted to sustain the withdrawal order of President Taft have endeavored, perhaps by force of necessity, to assume that these lands in being withdrawn, instead of the operation of the law being suspended, were withdrawn for some use or purpose of the Government. The order itself is definitely to the contrary. It may be here parenthetically observed that the President who made this withdrawal order was himself a very distinguished lawyer, of great learning in the law, and incapable of dissembling. That he publicly state in a way that it has become practically a matter of history that he made this order in deference to certain urgent public demands and with doubts and reservations in his own mind as to whether it was within his power or not, but thinking that probably the public interests were such that he should give the situa-

tion the benefit of the doubt, he made the withdrawal order; but never did he aver that in his own opinion the order was valid, but merely in substance to the effect that he felt that the public demand and urgency was such that he was justified in making the order, although in doubt as to its validity, leaving that question to later determination.

In face of the form and language of the withdrawal order, it should not be necessary to make an argument of any length to dissipate a contention that the withdrawal was made for any use or purpose of the government of the United States. There need be no question raised here but what where the public lands are placed on sale, or subject to entry and disposition by citizens, the government may exercise, nevertheless, its proprietary right to select, acquire or withhold certain of these lands for its own authorized, governmental uses, or purposes, but that nothing of the kind is here pretended, appears upon the face of the withdrawal order under consideration itself.

The material portions of the withdrawal order under consideration read as follows:

“In aid of proposed legislation affecting the use and disposition of petroleum deposits on the public domain, all lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral land laws. Etc.”

It has been urged in nisi prius courts that the President had in his mind some unexpressed idea or intention that the 4,500,000 acres of land withdrawn under this order, whether known to contain mineral oils or not, should be withdrawn for the use of the Navy. Our esteemed adversaries do not seem to appreciate that they are seeking to give to this executive order the force of law, and that a law always goes into effect either by force of its own language, or not at all. It is never to be aided, added to or subtracted from by evidence. If the President had any purpose or intention of the kind, he not only did not express it, but certainly must be understood to have said that he had no use or purpose in his own mind at all. Whatever use or purpose was in mind was in the mind of the Congress, and when the President referred to future

10 UNITED STATES OF AMERICA VS. MIDWEST OIL COMPANY

legislation, he did not refer to future legislation by the President or to anything that was in his own mind, but to future legislation by Congress, and something that may have inferentially and by psychological process have existed in the mind of Congress, but not in the mind of the author of this withdrawal order.

The whole scope and purpose of the order is expressed by the language, "In aid of proposed legislation affecting the use and disposition of petroleum deposits on the public domain."

By the existing acts of Congress these lands were expressly subject to exploration, discovery, entry and purchase and unless this order suspended this law, they so remained. This order did not affect any special or particular piece of land in any special or particular locality. It affected certain character of lands of vast extent and widely scattered through the country. The President of the United States did not say or intimate that these lands were needed or withdrawn or selected for any use or purpose by the government of the United States, but clearly expressed the idea that they were to be disposed of. If we should even endeavor to indulge in the inference that some of them were to be used, others to be disposed of, and that order was recognized, not as a subject of executive action, but of legislative action.

Therefore, we have no case or question of the power of the Executive under existing laws to take over certain property for and on behalf of the United States. But we have a clear and unequivocal question of the power of the Executive of the United States to say that an existing law of Congress is suspended and shall remain suspended until the Congress shall pass a different law for the use and disposition of something which is already, under an existing law of Congress, subject to use and disposition.

It is not a matter of use or appropriation; nothing of the kind is claimed or pretended. It is not even a matter of an endeavor on the part of the Executive to withhold lands for the temporary or permanent purposes of the government; but it is a clear and unequivocal statement of a suspension of a law until there is different legislation.

If we are not mistaken as to the fundamental and constitutional considerations here involved, and if we are not mistaken in what appears to be the unequivocal language of Con-

gress, and if we are not mistaken as to what appears to be the clear and unequivocal language of the Executive, by virtue of such constitutional principle, by virtue of the clear and unequivocal language of Congress, by virtue of the clear and unequivocal language of the Executive, this order fails of its own expression and its own weight, unless the President may suspend the operation of a law of Congress.

It is not, we repeat, a question of the withdrawal of lands, but of the suspension of the law.

The President did not say, or attempt to say, "The United States needs or desires these lands for forts, or arsenals, or military reserves, or national parks, or forest reservations, or Indian reservations, or national cemeteries, or any other conceivable purpose of the government, present or prospective. He did not pretend anything of the kind. He frankly said that whether the government might use some of these lands or not, or whether it might permit or authorize others to do so without disposing of them (the latter being the natural inference), that the Executive did not have in mind any withdrawal of these lands for governmental purposes; but he frankly and undeniably stated that they were withdrawn, not for any such purpose, but "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain." If this does not confute and defeat the contentions of those who seek to uphold the order of the President upon the theory of selection or appropriation for some governmental purpose, we are unable to appreciate the scope or use of language.

The language of the withdrawal order, we think, is sufficiently frank and expressive, and is conclusive of the question. The necessary rule is, however, to look rather to the legal effect of the words used than to their mere form. The whole substance and effect of this order is undeniably this; until the Congress, as the legislative branch of the government, shall enact different laws, the lands described in the accompanying lists are withdrawn from the effect of and from exploration, location, entry and all forms of disposition under existing laws. Or, the effect of the order would have been identically the same if the following words had been used:

"All lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral laws

12 UNITED STATES OF AMERICA VS. MIDWEST OIL COMPANY

of the United States, until the Congress shall pass laws different from those that are now in force and effect."

In the effort to sustain this order it has been suggested, as above indicated, that the President was withdrawing them for the products thereof—the petroleum presumed to be contained therein.

While, of course, if lands were withdrawn for military purposes, one of these purposes or the use might be the pasturage of horses, and we may assume that an adjacent field might be reserved for the raising of hay or other feed for immediate use. It is, however, a very different and a picturesque idea to suggest that these millions of acres of lands were withdrawn from their possible productiveness, not for use of the lands, but for use of the product. If this theory could be sustained without any declaration of congressional policy or act, there would be no lands that the President could not withdraw in entire suspension of any act of Congress. It can hardly be conceived that any lands exist that would not raise corn for horses, or barley or oats for feed, or that would not produce pasturage for cattle upon which to raise beef to feed the Army and the Navy, or that would not produce timber to build ships and forts, or materials with which to construct public improvements, or lead for bullets, or stone or copper for forts, or gold or silver for money, or oil or coal for fuel.

If the present or future possible necessities of the government in the way of a product for some probable or possible use could be used as a subterfuge as the basis of a withdrawal order (using the word "subterfuge" in its legal sense), there does not now exist, and there never did exist, any acre of the public land that could not by the Executive without congressional consent have been withdrawn from the operation of a law of Congress.

The government assumes that President Taft was withdrawing these lands for the supposed use of the Navy—4,500,000 acres—and by the process of psychology concludes that this was the use and purpose that lay in his mind—no other inference that we have heard of has been suggested—other than to keep them from being taken up by citizens under existing laws. If the law is to be considered and discussed by the processes of psychology and mind-reading, it should be kept in mind that President Taft's most cherished policy and his best beloved scheme was the promulgation of peace

throughout the earth; he had actually negotiated far-reaching and important treaties for the submission of all disputes between nations to arbitration—nevertheless, our friends on the other side ask us, in order to sustain this unprecedented withdrawal order, to assume that the greatest proponent of peace of this generation was assuming and preparing for war so prolonged that necessary oil for the Navy would consume the products of 4,500,000 acres. Assume extravagantly that in actual war the Navy could exhaust the product of as much as 1,000 acres of oil territory per annum, we would have sufficient oil to carry on war for 4,500 years preserved and stored in the earth, at the behest of the greatest advocate of peace of our generation. All of this, however, is mere digression, and, we confess, a somewhat fanciful reply to what appears to us to be a very fanciful argument.

In conclusion, this Court is to decide, as it appears to us, one fundamental question in this case; we have, at last, a case where there is no effort to withdraw or apply the lands to any existing present or future use, stated, understood or implied by the Executive. There is not even any stated, understood or implied use of the government of any character, present or future. But this 4,500,000 acres of public domain, all confessedly subject to be acquired by citizens under a law of Congress. The President, by executive assertion of his authority, declares nothing more nor less than that a law of Congress shall remain suspended; that these lands shall remain undisposed of; shall be withdrawn "in aid of future legislation," as the President himself puts it. In other words, in bald suspension of existing law until the Legislative branch of the government shall pass different laws more in accord, we may assume, with Executive ideas.

If the President has this power, it would be interesting to consider whether or not it may be taken away from him by Congress. If he has the power, and if it cannot be taken away, then until Congress passes laws pleasing to the Executive it is entirely within the power of the Executive to say that no more of the public lands shall be disposed of, notwithstanding a law of Congress, until the law passed by Congress meets the critical inspection and approval of the Executive. Or, even if Congress could by express enactment prevent the suspension of these laws and leave the public lands open to settlement beyond the withdrawal of the President, never-

theless, as to all existing laws and as to all future laws and all of the public lands, unless the Congress specifically prohibited the suspension of these laws by the President, the lands could be effectually withdrawn and the laws of Congress for the disposition thereof could be effectually suspended.

It is not possible, we think, to conceive of a law that more frankly or directly undertakes to suspend a law of Congress, and in the interval to deny to all citizens their rights as such under the law of Congress, than this withdrawal. Therefore, this is not a case, as all previous cases have been, of refined consideration as to whether the withdrawal falls in one class or another. This order of withdrawal, read and understood in accordance with its own expressed language, is not a withdrawal for any occupation or purpose or use of the government, but it is a withdrawal "in aid of future legislation"—in suspension of present laws, and if we understand the Constitution of our country and its laws, and the decisions of this Court, there is nothing better settled than that the Executive Department of this government, except that it is expressly authorized by the Legislative branch of the government, cannot interfere with or suspend the operation of a law. The plain, constitutional duty and function of the Executive branch of the government is, and the performance of this duty can be compelled by mandamus, to execute and enforce the laws, not nullify and suspend the laws.

Respectfully submitted,

FRANK H. SHORT,
Amicus Curaie.

On behalf of the Honolulu Consolidated Oil Company, a corporation, and many other oil locators, operators and claimants of property affected by the decision in this action.

Office Supreme Court, U.

FILED

MAY 7 1914

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. ~~488~~ 278

UNITED STATES, APPELLANT,

vs.

THE MIDWEST OIL COMPANY ET AL., APPELLEES.

BRIEF AMICI CURIAE BY LEAVE OF COURT.

ALDIS B. BROWNE.
ALEXANDER BRITTON.
EVANS BROWNE.
FRANCIS W. CLEMENTS.
FREDERIC R. KELLOGG.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 750.

UNITED STATES, APPELLANT,

vs.

THE MIDWEST OIL COMPANY ET AL., APPELLEES.

BRIEF AMICI CURIAE BY LEAVE OF COURT.

We have asked leave to file this brief in behalf of the Midland Oilfields Company, Limited, and the American Oilfields Company, Limited, whose interests may be materially affected by the opinion rendered.

We contend:

1. That congressional authority, or at least congressional acquiescence, must be found to support any Executive withdrawal or withholding of public lands from disposal in the manner provided therefor by the Congress, and

2. That congressional authority or acquiescence cannot be found to support the order of September 27, 1909, here in question.

I.

Congressional authority, or at least congressional acquiescence, must be found to support any Executive withdrawal or withholding of public lands from disposal in the manner provided therefor by the Congress.

Under the Constitution the power "to dispose of and make all needful rules and regulations" respecting the public domain is vested in the Congress. Article IV, section 3, U. S. Constitution.

In the exercise of its power Congress has established a Land Department, but the duties of its officers are prescribed by law, and they have no power except as conferred. From time to time Congress has enacted general laws prescribing the method of acquiring title to the public lands. It has limited certain class of disposals to agricultural lands; it has excepted from certain forms of disposal saline and mineral lands. In no one of these laws is its operation confined to such lands as, in the judgment of the Executive, may be permitted to remain subject thereto.

It is not our purpose to enter into an extended argument respecting the powers of the President. He is commanded to "faithfully execute" the law. In common with every other officer of the United States he is a creature of the law, subordinate and not superior thereto. His power of withdrawal of public lands from the disposition provided therefor by the Congress must find justification in the law. The withdrawal of lands which are at the time subject to disposal under an act of Congress can mean nothing more nor less than the suspension of the law. Indeed withdrawal amounts to an appropriation of the lands withdrawn and no appropriation of the public lands can be made for any purpose except by authority of Congress. *United States vs. Tichenor*, 12 Fed. Rep., 422-423.

It is admitted that no general power of withdrawal of the public lands has been directly conferred upon the executive

branch of the Government. It is suggested, however, that an inherent power is vested in the President respecting the public lands in the exercise of which he is empowered to withdraw public lands from general disposition when, in his opinion, it would be for the public good. If this inherent power permits the withdrawal of lands from the specific form of disposition provided by Congress may it not permit disposition of a tract specifically withheld by the Congress?

In *Burfenning vs. Railroad Company*, 163 U. S., 319, it was specifically ruled that the executive officers cannot override the expressed will of Congress respecting the public lands. THE WILL OF CONGRESS IS FULLY EXPRESSED WHEN IT HAS PROVIDED THAT A PARTICULAR CLASS OF LANDS MAY BE DISPOSED OF IN A GIVEN MANNER.

In the Matter of the Fort Boise Reservation the then Secretary, later Justice Lamar, had under consideration the question as to the effect which should be given to a reservation by the War Department of lands in excess of the quantity authorized to be withdrawn by the act of February 14, 1853, and with respect thereto he said (*Fort Boise Hay Reservation*, 6 L. D., 16, 19):

"Will such an act take the lands out of the class of public lands and require their disposal by special enactment? To so hold would indicate that the Executive might, in violation of law, put in reserve for military purposes any amount of lands, and thus take them out of the operation of the general law. To assert such a privilege is to claim for the Executive power to repeal or alter the acts of Congress at will."

The situation there under consideration, like that in the *Burfenning* case, involved an express congressional limitation, but the difference between overriding a congressional enactment that no more than a given quantity of land shall be reserved for a specifically authorized public use and rendering nugatory the public laws permitting the acquisition of lands by citizens in the manner prescribed by the Congress is but one of degree.

All of the cases relied upon by the appellant in support of the authority claimed to be vested in the Executive will, we submit, be found on examination to rest upon authority previously conferred by Congress or in later legislation in acquiescence of the authority previously exercised. These cases are fully considered in the briefs heretofore filed in this case, and only a passing reference will be made in illustration.

Thus, for example, in *Grisar vs. McDowell*, 6 Wall., 363, the court's dictum as to the executive power to reserve lands is, in part, supported by the statement that "the action of the President in making the reservation in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them."

So Attorney General MacVeagh, in the language quoted by appellant from his opinion (17 Op., 160), said: "Hence in reserving and setting apart a particular piece of land for a special public use the President must be regarded as acting by authority of Congress." So, too, the opinions of Assistant Attorney General Van Devanter (29 L. D., 32), of Attorney General Miller (19 Op., 371), and of Attorney General Brewster (17 Op., 258), as shown by the language quoted by appellant, are based on the same theory.

Recognition of inherent power in the Executive, which may be exercised in opposition to the expressed will of Congress, is a dangerous precedent and strikes directly at the foundation of our form of government.

This court has repeatedly held that there is no place in our constitutional system for the exercise of arbitrary power, and when the officers of the Land Department have exceeded the authority conferred by law this court has preserved the status of parties aggrieved by such unwarranted action.

THE RECOGNITION OF INHERENT POWER IN THE EXECUTIVE IS BUT THE GRANT OF ARBITRARY POWER.

For the views of the Executive branch of the Government at the time the withdrawal in question was made, respecting its power to withhold public lands from general disposition, it was said in the annual report of the Secretary of the Interior for the year 1908, at page 10:

"The public domain has been placed by Congress under the Interior Department, and ample authority is vested in the Chief Executive and the Secretary of the Department to take such action as is necessary to care for the public domain. During many years the Executive has in the exercise of this general authority withdrawn at different times and for various purposes areas of the public domain and for the time being prevented those areas from being entered for private use.

"FULL POWER UNDER THE CONSTITUTION WAS VESTED IN THE EXECUTIVE BRANCH OF THE GOVERNMENT, AND THE EXTENT TO WHICH THAT POWER MAY BE EXERCISED IS GOVERNED WHOLLY BY THE DISCRETION OF THE EXECUTIVE, UNLESS ANY SPECIFIC ACT HAS BEEN PROHIBITED EITHER BY THE CONSTITUTION OR BY LEGISLATION.

"In the exercise of this power it is the duty of the Executive to take such action as will protect the interests of all the people of the United States in their property rights, and, if the occasion requires and the facts warrant, it is the duty of the Executive to prevent the acquisition of the public domain by private interests if such acquisition be detrimental to the public welfare."

II.

Congressional Authority or Acquiescence Cannot Be Found to Support the Order of September 27, 1909, Here in Question.

The only legislation occurring since the withdrawal here in question is the law of June 25, 1910, commonly known as the Pickett act (36 Stats. L., 847).

Now the point here is that the congressional sanction, expressed or implied, without which there is no semblance of support to appellant's argument, was by the legislation referred to denied.

Let us first look to the nature and extent of the withdrawals which were made by the Executive just prior to the passage of the act of June 25, 1910.

About the year 1906 the practice was inaugurated of withdrawing from disposition, under laws applicable thereto, large areas of public lands, because the same were believed to be valuable for development of water power, *a factor never before referred to in legislation affecting disposal of the public lands*. Serious doubt was entertained by the officials as to their authority for making such withdrawals. This is clearly indicated by the methods resorted to. In the Executive orders the real purpose was not recited, the withdrawals being under the guise of so-called "administrative sites" for the use of the Forest Service, or under withdrawals made under the reclamation act, on the pretext that the lands were desired for use in connection with reclamation projects. Later, under alleged "supervisory authority," as defined in the report of the Secretary of the Interior for the year 1908, hereinbefore quoted, large tracts of supposed coal lands were withdrawn from disposition for the purpose of classification or the fixing of a price different from that named in the statute, and then follows the withdrawals, including the one here in question, when large areas of public lands supposed

to have value because of deposits of phosphates or oil, were withdrawn from sale, entry or location under public-land laws *in aid of proposed legislation*.

The specific order here in question withdrew 3,041,000 acres, and in referring thereto the Director of the Geological Survey, on whose recommendation all the withdrawals were made, says:

"In consequence Secretary of the Interior Ballinger on September 27, 1909, withdrew from all forms of entry, location or disposition, *all public lands believed to contain valuable deposits of oil or gas*. As information has since been obtained indicating other public lands to be valuable for these minerals they have also been withdrawn from all form of disposition under mineral or non-mineral land laws." (See Bulletin 537, p. 38.)

This is a true statement, and when considered in connection with the statement of Senator Borah hereinafter referred to, wherein he states that 127,658 acres have been withdrawn in the State of Idaho alone for power purposes, gives some idea as to the effect of a decision giving judicial recognition to the claimed inherent right in the Executive to suspend the laws of Congress. Surely such an appropriation of power to the Executive should not be recognized.

A claim for recognition of a limited withdrawal to meet an immediate exigency might appeal to the court, but the facts respecting these wholesale withdrawals show that the pretended exigency sought to be found in the future needs of the navy is evidently advanced to meet the exigencies of the case. Clearly the large withdrawals of phosphate lands and those supposed to be valuable for power purposes cannot be rested upon the supposed needs of either the army or navy, and they but shed light upon the specific withdrawal here in question.

If we look now to the Pickett bill, which became the act of June 25, 1910, we find that, as originally referred to the House, it embraced two important propositions:

(1) Conferring upon the President authority to make withdrawals of public land for purposes named, and (2) ratifying the withdrawals theretofore made. It was stated by Mr. Pickett in support of the bill (Cong. Rec., 61 Cong., 2d sess., 45, pt. 5, p. 5089) :

"During the administration of President Roosevelt large areas of the public domain containing valuable coal deposits, oil, water-power sites, and so forth, were, by Executive order, withdrawn from location, sale and entry for the purpose of conserving the interests of the people therein, and this policy has been continued by the present administration. The authority for such Executive action has been questioned. In many cases attempts have been made to appropriate land so withdrawn on the theory that the withdrawals were unauthorized. I shall not attempt at this time to discuss the legal question involved. It is sufficient for the purpose of this measure to say that the authority of the President to make withdrawals as contemplated in this bill is subject to doubt. It would therefore seem important to remove any doubt or uncertainty in the matter by express statutory authorization. On this subject the President of the United States, in his special message to Congress, January 14, 1910, says:

"The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land the disposition of which under such statutes, would be detrimental to the public interests is not clear or satisfactory. This power has been exercised in the interests of the public with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions. Undoubtedly Congress has not thus far fully acted on the recommendation of the Executive and the question as to what the Executive is to do under the circumstances is full of difficulty. It seems to me that it is the duty of Congress now, by a statute, to validate the withdrawals which have been made by the Secretary of the Interior and the President and to authorize the Secretary of the Interior temporarily to withdraw lands, pending submission to Congress of recommendations

as to legislation to meet conditions or emergencies as they arise.'

"There is another reason for the legislation at this time. The policy as to the disposition and use of the public resources has not crystallized, and until a method can be agreed upon in respect thereto proper authority should be lodged somewhere to preserve the *status quo*. On the proposition to confer this authority on the President there is, as I have before stated, practically no division of opinion among the members of the committee.

"The first issue that arises is over the clause in the committee bill ratifying and confirming prior withdrawals."

Whatever may be claimed as to previous Executive reservations the action upon this bill shows that the consent of Congress to the withdrawals, including that here in question, was expressly withheld. An implied authority cannot, it is submitted, be deduced where express consent is refused, and this we think is the clear import of the action taken by the Congress upon the Pickett bill.

This bill as it was first passed by the House contained a provision ratifying "all withdrawals heretofore made." (See Appendix, Exhibit 1.) This provision was directly responsive to the message of the President, who urged upon Congress the approval of his previous orders. But the Senate Committee in charge of the bill struck out the clause (Appendix, Exhibit 2).

The President's doubts as to the validity of the previous orders of withdrawal were fully shared both by members of the House and the Senate, and the Senate amendments, including that which struck from the House bill the confirmation of previous orders, clearly negative congressional acquiescence in these prior orders of withdrawal. In fact it seems that the passage of the pending bill was largely aided by the fear that its failure of passage might be construed into a legislative recognition of the power then being exercised by the Executive.

Thus Senator Borah, in the debate on June 7, 1910, when the Senate amendments were under discussion, said (Cong. Rec., 6st Cong., 2d sess., v. 45, pt. 7, p. 7543):

"I wish to ask the Senator a question. One of my reasons for being inclined to support the bill is the fact that it may have a limiting effect upon the power which has been heretofore and is now being exercised. The power is now being exercised, and in my judgment, in violation of law; but nevertheless it is being exercised. * * *

"I agree perfectly with the Senator from Wyoming in his legal proposition that these withdrawals have been without authority of law; that they were in violation of law; but they have taken place. The result has been the same to the settler. The result has been the same upon the country. We will force that precedent in my judgment, if we do not undertake to restrain such action within some statutory power.

"The question I desire to submit to the Senator is whether we had not better frame some withdrawal statute than to force upon the President the necessity of apparently acting without authority, because that is what we are doing, and it is what it seems they are going to continue to do. There are 127,658 acres of land withdrawn in the State of Idaho for power sites under an authority which does not exist; but it has the same effect upon the State as if it did exist—127,000 acres, more power sites than we will use in the next five thousand years in the State of Idaho."

As before stated, it is conceded that there is no statute conferring upon the Executive the general power to reserve from disposition public lands, and the only general act on this subject is the act of June 25, 1910.

The power given the President by that statute is to reserve lands "for water-power sites, irrigation, classification of lands or public purposes to be specified in the order of withdrawals." *Expressio unius est exclusio alterius*. Bearing in mind that the order of September 27, 1909, was constantly before Congress in the enactment of the statute of June 25,

1910, there we find a studious avoidance in that act of any authority for, or approval of, a withdrawal "*in aid of proposed legislation.*"

Still bearing in mind that the President's message requested ratification and approval of the executive withdrawal of September 27, 1909, and that that withdrawal specified no public purpose, it is of marked importance that the act of June 25, 1910, requires that the exercise of the President's power to withdraw must be accompanied by a *specification of the purpose in the order of withdrawal.*

Again the act of June 25, 1910, expressly provides that all lands withdrawn by the President shall be open to exploration, discovery, occupation and purchase under the mining laws of the United States, so far as the same apply to metaliferous minerals (act of June 25, 1910, amended by act of August 24, 1912). The order of September 27, 1909, on the contrary, withdrew the lands from all forms of location, entry or disposal under the mineral laws.

The withdrawal order reserved the land from all forms of settlement, selection, filing, entry or disposal under the mineral or non-mineral public-land laws. The act of June 25, 1910, on the contrary, provides that there shall be excepted from the force and effect of any withdrawal made under the provisions of that act, lands which at the date of such withdrawal are "embraced in any lawful homestead or desert entry theretofore made or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law." According to the terms of the withdrawal of September 27, 1909, no lawful homestead or desert entry or valid settlement could be made, or, if made, perfected, on any of the lands described in the order. Under the act of June 25, 1910, all such homestead or desert entries or other valid settlements could, on the contrary, be made up to the time of a withdrawal made pursuant to the statute.

The order of withdrawal provides that all locations or claims existing and valid at the date thereof may proceed to

entry, and, by implication, purports to cut off the right of purchase under the mining laws, of an *occupant* whose possession had not ripened into a location or claim. The act of June 25, 1910, on the contrary, expressly provides that the rights of a *bona fide* occupant or claimant of oil or gas bearing lands, complying with the provisions of the statute, shall not be affected or impaired by a subsequent order of withdrawal.

In all these respects the provisions of the order of September 27, 1909, not only failed to receive congressional recognition, but are directly contrary to the expressed will of Congress. Measured by this statute, how can the withdrawal here in question be upheld?

Again, section 2320, R. S., provides:

"But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Clearly, therefore, no right of purchase is acquired, nor is any claim in fact initiated under the mining laws as against the United States prior to actual discovery of a valuable mineral deposit within the limits of the claim located. However, by section 2 of the said act of June 25, 1910, it was provided that one in the *bona fide* occupation of oil or gas bearing land without *previous discovery* but in diligent prosecution of work thereon at date of withdrawal "shall not be affected or impaired by such order" so long as he shall diligently prosecute the work towards actual discovery, and this protection or grant of right was specifically made applicable to the lands attempted to be previously withdrawn by Executive order. Congress therefore not only withheld its assent to or acquiescence in the previous executive withdrawal of mineral lands, all of which claims would have been terminated had such assent been given, but, on the contrary, conferred rights upon these inchoate claims, even as against a possible recognition of such withdrawal by the courts.

Finally, this act also expressly provides that it shall not be construed as a recognition, abridgment or acknowledgment of any "asserted rights" or "claims" upon oil or gas bearing lands after a withdrawal made *prior* to the passage of the act, though such asserted rights or claims would obviously be in derogation of the prior executive withdrawal. Ratification withheld is, we submit, as effective here as though consent had been expressly refused.

Thus there is no congressional assent, express or implied, to be found to support the executive withdrawal of September 27, 1909. Congressional assent to or acquiescence in that withdrawal was purposely withheld in the passage of the act of June 25, 1910, the express provisions of which are not only repugnant to the terms of the order for such withdrawal, but to the purpose and effect thereof surely as applied to the rights of mineral claimants.

ALDIS B. BROWNE.
ALEXANDER BRITTON.
EVANS BROWNE.
FRANCIS W. CLEMENTS.
FREDERIC R. KELLOGG.



APPENDIX.

EXHIBIT 1.

61ST CONGRESS,
2D SESSION.

H. R. 24070.

IN THE SENATE OF THE UNITED STATES.

April 21, 1910.

Read twice and referred to the Committee on Public Lands.

AN ACT

To authorize the President of the United States to make withdrawals of public lands in certain cases.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assem-*
3 *bled,*

4 That the President be, and he hereby is, authorized to
5 with-

6 draw from location, settlement, filing, and entry areas of
7 public lands in the United States, including the Dis-

8 trict of
9 Alaska, for public uses or for examination and classifi-

10 cation
11 to determine their character and value; and the Presi-

12 dent is
13 further authorized, when in his judgment public in-

14 terest

- 9 requires it, to withdraw from location, settlement, filing,
and
10 entry areas of public lands in the United States, includ-
ing the
11 District of Alaska, whether classified or not, and sub-
mit to
12 Congress recommendations as to legislation respecting
the
13 land so withdrawn.

2

- 1 SEC. 2. That the Secretary of the Interior shall re-
port
2 all withdrawals made under the provisions of this Act to
3 Congress at the beginning of its next regular session
after
4 date of withdrawals, specifying the purposes of each
5 thereof. All withdrawals heretofore made and now
existing
6 are hereby ratified and confirmed as if originally made
under
7 this Act. All withdrawals shall remain in force until re-
8 voked by the President or by Congress.

Passed the House of Representatives April 20, 1910.

Attest:

A. McDOWELL, *Clerk*.

(Endorsed:)

2D SESSION, }
61ST CONGRESS. }

H. R. 24070.

APPENDIX EXHIBIT 2.

Calendar No. 553.

61st Congress, 2d Session.

H. R. 24070.

In the Senate of the United States.

April 21, 1910.

Read twice and referred to the Committee on Public Lands.

April 23, 1910.

Reported by Mr. Smoot, with an Amendment.

May 26, 1910.

Ordered to be reprinted with new amendment in lieu of amendment previously reported.

(Strike out all after the enacting clause and insert the part printed in italics.)

AN ACT

To authorize the President of the United States to make withdrawals of public lands in certain cases.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assem-*
 3 *bled,*

4 ~~That the President be, and he hereby is, authorized to~~
 5 ~~with-~~

6 ~~draw from location, settlement, filing, and entry areas of~~
 7 ~~public lands in the United States, including the Dis-~~
 8 ~~trict of~~

9 ~~Alaska, for public uses or for examination and classifi-~~
 10 ~~cation~~

~~7 to determine their character and value; and the Presi-~~
~~dent is~~
~~8 further authorized, when in his judgment public interest~~
~~9 requires it, to withdraw from location, settlement, filing,~~
~~and~~
~~10 entry areas of public lands in the United States, includ-~~
~~ing the~~

2

~~1 District of Alaska, whether classified or not, and sub-~~
~~mit to~~
~~2 Congress recommendations as to legislation respecting~~
~~the~~
~~3 land so withdrawn.~~
~~4 SEC. 2. That the Secretary of the Interior shall report~~
~~5 all withdrawals made under the provisions of this Act to~~
~~6 Congress at the beginning of its next regular session~~
~~after~~
~~7 date of the withdrawals, specifying the purposes of each~~
~~8 thereof. All withdrawals heretofore made and now~~
~~existing~~
~~9 are hereby ratified and confirmed as if originally made~~
~~under~~
~~10 this Act. All withdrawals shall remain in force until re-~~
~~11 voked by the President or by Congress.~~
~~12 That the President may, at any time in his discretion,~~
~~tem-~~
~~13 porarily withdraw from settlement, location, sale, or~~
~~entry~~
~~14 any of the public lands of the United States and the~~
~~Territory~~
~~15 of Alaska and reserve the same for water-power sites,~~
~~irriga-~~
~~16 tion, classification of lands, or other public purposes to be~~
~~17 specified in the orders of withdrawals, and such with-~~
~~drawals~~
~~18 or reservations shall remain in force until revoked by~~
~~him or~~

19 by an Act of Congress.

20 SEC. 2. That all lands withdrawn under the pro-
visions

21 of this Act shall at all times be open to exploration, dis-
covery,

22 occupation, and purchase, under the mining laws of the
23 United States, so far as the same apply to minerals other
than

24 coal, oil, gas, and phosphates: *Provided*, That the
rights of

25 any person who, at the date of any order of withdrawal

3

1 heretofore or hereafter made, is a *bona fide* occupant
or claim-

2 ant of oil or gas bearing lands, and who, at such date,
is in

3 diligent prosecution of work leading to discovery of oil
or gas,

4 shall not be affected or impaired by such order, so long
as such

5 occupant or claimant shall continue in diligent prosecu-
tion of

6 said work: *And provided further*, That this Act shall
not be

7 construed as a recognition, abridgement, or enlargement
of any

8 asserted rights or claims initiated upon any oil or gas
bearing

9 lands after any withdrawal of such lands made prior
to the

10 passage of this Act: *And provided further*, That there
shall

11 be excepted from the force and effect of any withdrawal
made

12 under the provisions of this Act all lands which are,
on the

13 date of such withdrawal, embraced in any lawful home-
 14 stead
 15 or desert-land entry theretofore made, or upon which
 16 any
 17 valid settlement has been made and is at said date being
 18 maintained and perfected pursuant to law; but the
 19 terms of
 20 this proviso shall not continue to apply to any particu-
 21 lar tract
 22 of land unless the entryman or settler shall continue to
 23 com-
 24 ply with the law under which the entry or settlement
 was
 made: *And provided further,* That hereafter no forest
 reserve
 shall be created, nor shall any additions be made to
 one here-
 tofore created within the limits of the States of Oregon,
 Wash-
 ington, Idaho, Montana, Colorado, or Wyoming, ex-
 cept by
 Act of Congress.

4

1 SEC. 3. That the Secretary of the Interior shall report
 2 all such withdrawals to Congress at the beginning of its
 3 next
 4 regular session after the date of the withdrawals.

Passed the House of Representatives April 20, 1910.

Attest:

A. McDOWELL, *Clerk.*

In the Supreme Court of the United States

October Term, 1918

1-1078

THE UNITED STATES OF AMERICA, Appellant,

vs.

THE MIDWEST OIL COMPANY, et al.,

Appellees.

On Petition Granted to the Appellees, leave to file this
United States Circuit Court of Appeals for the
Eighth Circuit, in Appeal from the District Court
of the United States for the District of Wyoming.

SUPPLEMENTAL BRIEF ON BEHALF OF THE
APPELLEES.

HENRY F. WARR

HENRY MOOREHEAD, Jr.

RAMON SCHUBERT

COUNSELLORS AT LAW

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 750.

THE UNITED STATES OF AMERICA, APPELLANT,

VS.

THE MIDWEST OIL COMPANY, ET AL.,
APPELLEES.

*On Record Certified to the Supreme Court from the
United States Circuit Court of Appeals for the
Eighth Circuit on Appeal from the District Court
of the United States for the District of Wyoming.*

SUPPLEMENTAL BRIEF ON BEHALF OF THE
APPELLEES.

In view of the fact that by order of the court this case has been redocketed and set down for reargument, we have thought it appropriate to submit, in printed form, some additional suggestions. We have, therefore, prepared this supplemental brief. We have tried to avoid repetition of matters stated in our original brief, except to such slight extent as was necessary to enforce the new points made.

I.

The Well-Established Public Policy of the United States Is Opposed to Appellant's Contention.

The *public policy* of the United States in relation to control over the public lands, and especially as to public *mineral* lands, is opposed to the validity of the executive withdrawal of September 27, 1909.

The public policy here referred to is manifested by a succession of recent statutes. In the first appendix to our original brief (p. 169) we called attention to the fact of discretionary power being given by Congress to the Secretary of the Interior in reference to the survey and location of reservoir sites. Congressional action specifically provided that the lands selected for sites for reservoirs "and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law." (25 Stat. L., 527.)

A limitation upon the broad authority so given was soon after established by congressional action. By act approved March 3, 1891, it was provided that the reservoir sites to be selected and located under the law above mentioned "shall be restricted to and shall contain only so much land as is *actually necessary** for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the selection of said reservoirs."

26 Stat. L., p. 1101.

* In all quotations in this brief italics are ours.

By the same act, however, last above cited, the President was given very large authority for the establishment of forest reserves. This statute is also cited in the appendix to our former brief (p. 169), and the clause referred to reads as follows:

"Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

26 Stat. L., 1103.

Here was *statutory* authority permitting the President, at his own discretion, to make the selection of such reserves, and define their limits, and without any restriction as to the character of the land, whether mineral or non-mineral, that should be included in such reservation.

This statute is the high-water mark of authority given by Congress for large reservations of the public lands. But limitations upon the power so given were soon after expressed. By act approved June 4, 1897, it was provided as follows:

"And any *mineral lands* in any forest reservation which have been or may be shown to be such, and subject to entry under the existing *mining laws* of the United States, and the rules and regulations applying there-

to, shall continue to be subject to such location and entry, notwithstanding any provision herein contained."

In the same act it was provided as follows:

"Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of *prospecting, locating* and developing the *mineral* resources thereof: Provided that such persons comply with the rules and regulations covering such forest reservations."

30 Stat. L., p. 36.

It will be observed that this provision of law was made by the Fifty-fifth Congress, at its first session, and the Fifty-fourth Congress had, only four months before, passed the law cited in our original brief, to-wit, the act of February 11, 1897 (29 Stat. L., 526), which provided "that any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to land containing *petroleum* or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

Five years after the act of February 11, 1897, was passed, Congress by statute showed its continued adherence to the *method* therein prescribed for obtaining title to oil lands, for in the act relating to the Philippine Islands, which included provisions for the acquisition of titles to lands, it was provided as follows:

"That any person authorized to enter lands under this act may enter and obtain patent to lands containing *petroleum* or other mineral oils, and chiefly valuable therefor, under the provisions of this act relative to *placer mineral* claims."

32 Stat. L., 702, sec. 42.

Under the broad authority given by the forest reserve statutes, temporary withdrawals of lands, with the view of the creation of permanent forest reserves under the authority of the statute, had been made by the executive department, and these *temporary* withdrawal orders at first contained no excepting clause in respect of mineral lands, which was the occasion of correspondence between the Commissioner of the General Land Office and the Secretary of the Interior; and on November 21, 1903, Secretary Hitchcock advised the Commissioner of the General Land Office as follows:

"The act of June 4, 1897 (30 Stat., 36), explicitly provides that nothing therein shall prohibit 'any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, *locating and developing the mineral resources* thereof,' and provides that any *mineral* lands in any forest reservation shall be subject to *location and entry* under the *mineral laws*. In view of this provision as to the effect of the creation of a forest reserve upon mineral lands included therein, there would seem to be no good purpose served in withdrawing

such lands under a temporary order for the purpose of determining whether a permanent reservation shall be established."

32 L. D., 307, 308.

The wide discretion which had been vested in the President by congressional authority as to the making of forest reservations was further limited by the act of March 4, 1907, which contained this provision :

"Provided, further, that hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado or Wyoming, *except by act of Congress.*"

34 Stat. L., 1271.

This same provision was repeated, *ipsisimis verbis*, in the act of June 25, 1910 (36 Stat. L., 848), which last-mentioned statute is fully discussed in our original brief (pp. 131-139).

It is interesting to observe that on December 6, 1910, the President in a message to Congress urged a modification of this very limitation. In that message, after referring to his conservation address at St. Paul in September, 1910, he says:

"For the reasons stated in the conservation address, I recommend :

First : That the limitation now imposed upon the executive, which forbids his reserving more forest lands in Oregon, Washington,

Idaho, Montana, Colorado and Wyoming, be repealed."

Message of December 6, 1910, p. 55.

Now, what did Congress do, in view of this recommendation of the President? It took no immediate action, but by the amendment to the act of June 25, 1910, hereinafter mentioned—to-wit, by the act of August 24, 1912—instead of complying with this recommendation of the President, it widened the prohibition against increase of forest reserves by including in such prohibition the State of California in addition to those previously mentioned, it being provided in that statute as follows:

"That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of *California*, Oregon, Washington, Idaho, Montana, Colorado or Wyoming, *except by act of Congress.*"

37 Stat. L., 497.

This statutory provision shows a purpose by legislative action, not to enlarge, but to restrict, the powers of the President as to withdrawal of public lands, or the making of large reservations of public lands for purposes theretofore authorized; and this action is taken in opposition to direct recommendations of the President.

As further illustrating the policy of the government in the maintenance of rights given to citizens to locate mineral lands under the mining laws, we call attention to a situation developed by the record in

this case and by statutes, as follows: Petroleum Withdrawal No. 5, of September 27, 1909, purported to withdraw all the lands mentioned in the lists accompanying the withdrawal order (which, as shown in our original brief, included all the known public petroleum lands of the United States) "*from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws*" (Rec., p. 8). The order in its scope would prevent the location or acquisition of *metalliferous* public lands, as well as those containing oil; and yet when, in accordance with the earnest recommendations of the executive, Congress passed a law giving power of withdrawal, it specially provided:

"That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States so far as the same apply to minerals other than coal, oil, gas and phosphates."

Act of June 25, 1910, 36 Stat. L.,
847.

Congress thereby expresses its *disapprobation* of the wide scope of the withdrawal order of September 27, 1909, and, while yielding to the President's recommendations in reference to certain minerals, still maintains the right of citizens to utilize the mining laws for the acquisition of public mineral lands, except as to the kind of minerals mentioned—coal, oil, gas, and phosphates—thereby carefully limiting the extent to which, even under legislative authority, the

privileges given by the mining laws may be suspended by the Executive.

Some time after the passage of the act of June 25, 1910, the President came to the conclusion that the exceptions as to entries of mineral lands fixed by that act should be widened so as to cover potash and nitrates, and in his message of March 26, 1912, he recommends an amendment of the statute. The result was the act of August 24, 1912, which amended section 2 of the act of June 25, 1910, so that the first part thereof should read as follows:

"That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States so far as the same apply to *metalliferous minerals*."

37 Stat. L., 497.

We here find again manifested the purpose of Congress, while yielding to the recommendations of the President as to specific minerals, still to hold the mining laws intact, except as, by *its own statutory provision*, it excepts *certain* minerals from the operation of those mining laws, within areas covered by the authorized withdrawals.

The soundness of appellant's contention may be, in a measure, tested by assuming that the location made by the grantors of appellees on March 27, 1910, was a location of a lode-mining claim in which there had been a discovery of gold; that this discovery was such as to show the property more valuable for the gold contained in it than for any other purpose; that

the necessary excavations were made, the claim marked as required by law, and location certificate filed, and that all the proceedings required by the mining laws of 1872 were fully complied with prior to the passage of the act of June 25, 1910. The case would then be exactly like the present case, except that it would relate to metalliferous ores instead of to oil.

Now, would this withdrawal order be valid as against the claim of the locator of such lode-mining claim? The appellant could make exactly the same argument that it now makes in reference to the implied or inherent power of the President to make withdrawals of lands, and as to the contemplated naval uses of the lands so withdrawn. But the mining laws of 1872 were in full force and effect, and when we come to the act of June 25, 1910, we find that Congress leaves these laws intact, of course as to lands not withdrawn, and even as to those lands which, *under the authority of the statute*, may thereafter be withdrawn. The right to explore such "withdrawn" lands for metalliferous ores, and to locate and acquire title to the lands containing such ores, is by express enactment still retained. The locator's right, denied by the *order*, had been created and was protected by laws enacted *prior* to the order, and was protected, even as to lands validly withdrawn, by statute enacted after this *order* was made. Would not the necessary inference be that the order of withdrawal of September 27, 1909, was void as to such lode-mining claims so based on the discovery of metalliferous ores? All legislative precedent, all precedent of any kind, would say that the rights of the locators under existing laws remained unaffected notwithstanding the withdrawal order. Now, how does the present case differ from the

one supposed? It relates to the discovery of oil instead of the discovery of gold, and that is the only respect in which it differs from the case assumed. But this difference, instead of weakening our contention, strengthens it, in view of the fact that twenty-five years after the mining laws had been passed—to-wit, in February, 1897—a particular statute had been enacted which provided that *oil* lands might be entered under the placer-mining act; and the act of June 25, 1910, did not attempt to change the provisions of that statute, and especially provided that such act of June 25, 1910, should *not* be construed as *abridging* any rights claimed to have been acquired after the withdrawal of September 27, 1909, and before the enactment of the statute itself. If the conclusion is logical that in the assumed case of a gold-mining claim the withdrawal order was invalid, then, *a fortiori*, is it invalid as to *oil* claims located and perfected pursuant to the definite authority of Congress given by the act of February 11, 1897.

Moreover, the argument of appellant leads to another strange conclusion. The order of September 27, 1909, as already stated, purported to withdraw the lands mentioned from *all* forms of entry by private citizens, and thereby to prohibit the acquisition of metalliferous lands. The act of June 25, 1910, provided that all lands "*withdrawn under the provisions of this act*" should be open to acquisition as to metalliferous minerals. This act was not an act confirmatory of previous withdrawals, as we have abundantly shown. Our contention is that it granted to the Executive a power he did not previously possess. But under appellant's argument, instead of extending executive power, this statute *restricted* a power al-

ready possessed. Under such a contention the locator of a lode-mining claim, who initiated and perfected his claim after September 27, 1909, and *before* the withdrawal of July 2, 1910 (based on the act of June 25, 1910), would lose his claim, while an adjoining locator who initiated his claim after the withdrawal of July 2, 1910, would hold his claim by valid title.

In our original brief we contended that there had never been a practice or continued usage on the part of executive officers of *withdrawing* public *mineral lands* from location or entry under existing laws. (Brief, p. 129.) And this was in answer to the contention made by the appellant that there had been many illustrations of the withdrawal of lands for various purposes, and especially of *appropriations* of lands for military uses and for Indian reservations.

In the appellant's supplemental brief (p. 18) it is contended that a long-existing executive practice is not necessary to sustain appellant's argument. Counsel say: "Antiquity is not the only touchstone." And then, again, further say that "an agent's implied authority widens as his acts extend with the knowledge of his principal."

This is an insidious argument for the encroachment of executive power upon the legislative power. Knowledge of the principal is assumed from the fact that reports are made by the Land Department, and the mere *silence* of Congress is contended to be, under such circumstances, an authorization of the agent's acts so reported, even though they be in violation of existing law. We have in our original brief discussed this subject. It seems to us an untenable doctrine. It means that gradual encroachments may be made by the Executive upon the powers which the Constitution

vests in Congress alone, and it construes the fact that Congress does not in terms by affirmative action repudiate the executive act, as having the effect of changing the *constitutional* distribution of powers; and the contention is that a few *recent* executive acts (not amounting to long-recognized usage) are evidence of authorization by Congress, because Congress has not in terms *objected*.

One insurmountable objection to this argument of counsel for the government is that when Congress enacts a statute — a “perpetual” statute (*United States vs. Gear*, 3 How., 120, 131) — such statute speaks not only as of the day of its approval, but for *every* day it stands unrepealed. It is “new every morning.” On September 27, 1909, the act of February 11, 1897, was as effective as if it had been enacted on the preceding day. So, also, was the act of May 10, 1872. Such laws were as binding upon the Executive as on the meanest citizen. (Cases cited in our former brief, p. 122.) If there had been previous violations of these statutes, and however frequent such violations had been, that would not nullify the law. If the order of September 27, 1909, was itself in violation of the laws we have cited, then it cannot be validated by reason of previous like violations. The validity of the order must be tested by the statutes then in force.

In our original brief we contended not only that there was no customary usage or long-continued practice of withdrawing public *mineral* lands from location or entry under existing laws, but that there were no precedents prior to the order of September 27, 1909, for such withdrawal. And that order is the very order the validity of which is now in controversy.

Counsel do not cite any case of the *withdrawal* of lands from *mineral entry*, and, as applied to the subject now under consideration, the "agent's implied authority" has not been widened "with the knowledge of his principal."

Moreover, the argument for an implied authority of the character now contended for by the government counsel, growing out of unchallenged acts of the Executive, is completely overruled by legislative enactments of the character we have hereinabove set forth, which show a determined and continuous legislative policy which is inconsistent with the implied executive power for which appellant contends. The argument is further vitiated as to the specific case now on hearing by the fact that the President specially requested, and the original bill (H. R. 24070) provided, that this order of September 27, 1909, should be ratified and confirmed; but *Congress* expressly *refused* such ratification or confirmation, struck out of the bill the provision to that effect, and provided that rights claimed, arising *after* the order of withdrawal was made, should not be deemed "abridged" by anything contained in the act which Congress then passed.

Since the former argument in this cause, there has been issued from the press the third edition of Lindley on Mines. Mr. Curtis H. Lindley, the author of that work, is a law writer of great experience and high repute, and the earlier editions of his work have been frequently cited as authority and relied on in decisions of this court.

In the new edition of his valuable treatise Mr. Lindley discusses the subject which we are now considering. He says:

"In determining what is 'public policy,' we are not at liberty to look at general considerations of the supposed public interests and policy of the nation upon this subject beyond what its constitution, laws and judicial decisions make known to us. Remote inferences, or possible results or speculative tendencies, are not to be indulged in for such purposes.

'Public policy' is not to be determined by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public. It will also be readily conceded that any executive withdrawal which is avowedly for a purpose which contravenes a recognized existing public policy readily deducible from the constitution, laws and judicial decisions cannot be upheld."

1 Lindley on Mines (3d ed.), p. 437.

The Court of Appeals of the Eighth Circuit, speaking through Judge Sanborn, says:

"The public policy of a state or nation must be determined by its constitution, laws and judicial decisions; not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public." (Citing cases.)

Hartford F. Ins. Co. vs. Chicago, M.
& St. P. Ry. Co., 70 Fed., 201, 202.

The author of the treatise above mentioned considers the withdrawal order of September 27, 1909, as

invalid, and he assigns the following reasons for his conclusion :

“First : The order was made confessedly in aid of proposed legislation and therefore not in pursuance of any duty, express or implied, enjoined upon the executive under any existing law.

Second : It was not made for any definite recognized public governmental purpose, to satisfy any governmental necessity or to aid in the performance of any public governmental function.

Third : It was not made in the furtherance of any recognized or defined public policy, but in an attempt to advocate a change in that policy.

A small group of men in official life, considering that our public land laws as they exist in the statute books were unwise, unsuited to our industrial and economic conditions and should therefore be modified or repealed, may properly recommend to the law-making body modifications in or change of the system. But this does not establish a public policy, nor authorize the executive to withdraw any part of the public domain from mineral location to await the action of congress on their proposals. Such withdrawal is practically the nullification or absolute suspension of the operation of laws over withdrawn areas, to abide an event which may never happen. Existing ‘public policy’ is found in the statutes of the United States

opening the public domain to location under the mineral land laws, and not in the conception of government officials that the laws and the policy should be changed. Under acts of congress dealing with national forests, the executive is prohibited from closing the areas, temporary or permanent, from the prospector and the miner. Does this not establish a public policy, and is not the withdrawal under consideration an attempt to sequester a part of the public domain in order to give congress the opportunity of changing the policy? * * * We are not concerned with the wisdom or unwisdom of the proposed changes in law and policy. Our inquiry is limited to the sole question of power of the executive to exercise a function which under the constitution is confided to congress. We do not think the executive has that power."

1 Lindley on Mines (3d ed.), pp. 439-440.

II.

No Lands in Wyoming Were Reserved for Naval Uses.

In our original brief and argument we contended that the lands in controversy, being a part of the 170,000 acres in Wyoming covered by the withdrawal order of September 27, 1909, were not withdrawn for naval uses, and, indeed, that no lands in Wyoming were withdrawn for naval uses. Since making that

contention at the former hearing in this court, we note that the Interior Department of the government of the United States fully agrees with us. The present Secretary of the Interior in his last annual report (1913), at page 15 thereof, specifically states:

"The *one sole* reservation of oil lands for governmental use is that in *California*, over the withdrawal of which litigation is now pending."

This "sole reservation of oil lands for governmental use" consists of 68,249 acres mentioned by the Director of the Geological Survey, in Bulletin No. 537, and discussed in our former brief at pages 22 and 23. We contended in our brief that the dominant purpose of the withdrawal of vast areas of land, aggregating 4,654,000 acres, was not for naval uses—that such use was but an incident and confined to California—but was to prevent the acquisition of these lands under the existing mining laws, in the hope and expectation that Congress would change the mode of their acquisition. Now, in opposition to the contention made by the appellant in this case, that the entire withdrawal of several million acres was for naval uses, we have this express declaration of the Secretary of the Interior himself to the effect that the only reservation for governmental use is the one in *California*.

III.

The Authority of the President to Make the Withdrawal of September 27, 1909, Cannot Be Implied from His Statutory Duties Concerning the Navy.

In the supplemental brief of the appellant it is argued, commencing at page 11, that this implied power in the President may be derived from his statutory duties concerning the navy. As a basis for the argument, appellant quotes section 417 of the Revised Statutes, which provides:

"The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the *procurement of naval stores and materials*, and the construction, armament, equipment and employment of vessels of war, as well as all other matters connected with the naval establishment."

And section 1552 of the Revised Statutes is also cited. It reads in the following words:

"The Secretary of the Navy may establish, at such places as he may deem necessary, suitable *depots* of coal, and other fuel, for the supply of steamships of war."

Is it not rather a far-fetched argument to deduce from these statutory provisions an authority in the Secretary of *Interior*, even though with the approval of the President, to withdraw from public entry under existing laws all the mineral oil domain of the United

States, especially in view of the constitutional provision, much higher than any statute, which vests in *Congress* the exclusive power to dispose of, and make all needful rules and regulations respecting, property belonging to the United States? (See our former brief, pp. 37-40.)

The provisions of section 417 of the Revised Statutes, like those of section 441, relate only to the administrative duties of the head of the department, and give him no power that is inconsistent with existing law. In fact, it is especially provided by section 161 of the Revised Statutes as follows:

"The head of each Department is authorized to prescribe regulations, *not inconsistent with law*, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

In the face of statutes which give definite rights to citizens in reference to public mineral lands, it is hard to see the validity of the argument that is here presented by appellant.

Counsel also, in further support of this argument, cite a provision of the appropriation act of March 3, 1909, which they say expressly authorizes the procurement of coal and *other fuel*. (35 Stat. L., Ch. 255, p. 761.) The language of the provision referred to is as follows:

"Coal and Transportation: Purchase of coal and other fuel for steamers' and ships'

use, and other equipment purposes, including expenses of transportation, storage, and handling the same, and for the general maintenance of naval coaling depots and coaling plants, five million dollars."

We contended on the former hearing that, before it would be possible for the withdrawn lands to be utilized for naval purposes, an entire change of legislative policy would be necessary. We urged that the government had always been in the habit of *buying* its fuel supplies upon the market, and not producing them from its public lands by its own agency, and that, in order that the so-called public use might justify the withdrawal of mineral oil lands from the operation of existing laws, it would require a *legislative change* in a long-continued government policy. (Former brief, p. 16.)

We have in the very statute cited by counsel an illustration that points our argument. The appropriation act referred to wholly pertained to the "purchase" of coal and other fuel. That has always been the customary method by which the government would secure its supplies, and the private entry of oil lands under existing laws would not stand in the way of the exercise of this power and right by the government. As stated at pages 155 and 156 of our former brief:

"If, by private effort, oil is produced from such located lands, it becomes a part of the common supply for the industries and commerce of the country, and represents no actual loss to the people."

Instead of limiting, it increases the opportunities of the government to do exactly what this appropriation bill provided for, and that is to purchase fuel for steamers' and ships' use.

Consideration of this argument of the government suggests also an inconsistency in the reasons urged by the Director of the Geological Survey for the withdrawal of petroleum lands from the operation of existing laws. On February 24, 1908, in a letter to the Secretary of the Interior, Mr. George Otis Smith, the Director of the Geological Survey, uses this language:

"Regarding the petroleum supply, the production last year *did not meet the requirements of the trade*, and the reserve stock was drawn on to meet the demand. At present the rate of *increase in demand* is more rapid than the increase in production, and this, taken in connection with the great falling off in certain of the older fields, due to depletion of the sands and to flooding by water of sands which otherwise might be productive, shows how important is this matter of a conservation of the remaining supply." (Appellant's brief, p. 109.)

Yet in the very next year, in a letter to the Secretary of the Interior under date of September 17, 1909, Mr. George Otis Smith, the Director of the Geological Survey, uses this language, after speaking of the "survey's conservation report on the petroleum resources of the United States":

"In this report it is shown that the present *production* of petroleum *exceeds* the legitimate demands of the trade and that inasmuch as the disposal of the public petroleum lands at nominal prices simply encourages overproduction the logical method of checking this unnecessary waste would be to secure the enactment of legislation that would provide for the sane development of this important resource. In view of the well-known facts of the mode of occurrence of oil and the all too common practice of drilling wells close to boundary lines of private holdings that are being developed for oil, conservation of the petroleum supply demands a law that will provide for disposal of the oil remaining in the public domain in terms of barrels of oil rather than of acres of land." (Appellant's brief, pp. 110-111.)

These arguments not only oppose each other, but it will be observed that in both cases it is the "demands of the *trade*" that are made the special basis of the recommendations; and that the prime object of the recommendation is to induce a change of the law as to the *method of disposition* of petroleum deposits, and that the requirements of the navy constitute but an incident in the argument, as urged by us in our former brief (pp. 9-23).

IV.

The Argument of Appellees Does Not Depend upon Any "Dedication" of the Mineral Lands to Private Acquisition

Counsel for the government, at several places in their original and supplemental briefs, contend that our argument attributes to the mining law a purpose to *dedicate* all the public mineral lands in the United States to private acquisition. In their supplemental brief they say that we "treat it as though it evidenced an intention of Congress that every foot of such land should be devoted to this purpose and none other." They say that our idea "seems to be that every parcel has been acted upon by the legislative will and appropriated as effectively as though it had been specifically described and set apart by statute." (Appellant's supplemental brief, p. 2.)

This is very remote from our contention. But we do contend that Congress does by statute extend rights to the citizens in reference to mining lands. Counsel for the government call them "offers" and say: "These offers are *continuing* general offers." (Appellant's brief, p. 18.) The fact that they are continuing general offers, effective every day, is sufficient for our purpose, for they thereby give a right to the private citizen; and while the power that gave the right—to-wit, Congress itself—can at any time revoke the offer so made prior to the accrual of *vested* rights, yet, until so revoked by the power that made it, the offer stands good and may be availed of by the citizen.

Counsel say (brief, p. 19) that Congress has made the Executive "the guardian of the people of the United States over the public lands," citing *Knight vs.*

Land Association, 142 U. S., 161, 181. It would be well to complete the quotation. It is as follows:

"The *Secretary* is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the *law is carried out*, and that none of the public domain is wasted or is disposed of to a party *not entitled to it*."

We can afford to stand upon this statement of the law, for our rights rest upon unrepealed statutes, and under those statutes our grantors were entitled to the land they located.

But under what circumstances does this court make the statement we have above quoted? It is made in reference to the Secretary's supervisory control over *surreys* of public lands; and Justice Lamar, in announcing the decision of the court in that case, said:

"It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding."

Knight vs. Land Association, 142 U. S., 161, 176.

Counsel again, in this connection, quote from *Wilson vs. Jackson* (13 Peters, 496, 514), as follows:

"We cannot suppose that this bounty was designed to be extended, at the sacrifice of *public establishments, or great public interests*."

But we have already shown in our former brief that this court was very particular to show, in the case of *Wilcox vs. Jackson*, that the previous *appropriations* of lands for public uses involved in that case had been authorized by *statutes*—statutes which had been enacted before the appropriation was made; and at the time the claim of the settler arose in that case there was in existence a “public establishment” upon the very land in controversy, and public interests were involved in the possession, then had by the government, of that particular land. Indeed, if counsel had included in their quotation the very next succeeding sentence, they would have found that it reads as follows: “When the act of 1830 was passed, Congress must have known of the authority which had, *by former laws*, been given to the President, to establish trading houses and military posts.” The lands there involved came within the rule much later announced by Justice Brewer in *Scott vs. Carter* (196 U. S., 100, 109); they were lands which for some *special public purpose* had been, in *accordance with law*, taken full *possession* of and were in the *actual occupation* of the government.

The “continuing general offers” made to the private citizen by the mining statutes apply to all public mineral lands, “unless some particular lands have been withdrawn from sale by *congressional authority*, or by an executive withdrawal *under such authority*, either expressed or implied.”

Lockhart vs. Johnson, 181 U. S., 516, 520.

In various cases cited by us in our former brief the original withdrawal, afterwards held invalid by this court, had been made by the Secretary of the In-

terior, and his act is deemed the act of the President. But in those cases, under the "continuing general offers" made by the homestead and pre-emption acts, the rights of settlers originating subsequent to the withdrawal order were held to be good. The previous withdrawal orders did not affect their validity.

Hewitt vs. Schultz, 180 U. S., 139.

Southern Pacific Ry. Co. vs. Bell, 183 U. S., 675.

Nelson vs. Northern Pacific Railway, 188 U. S., 108. (See our former brief, pp. 56, 84.)

Sjoli vs. Dreschel, 199 U. S., 564.

Brandon vs. Ard, 211 U. S., 11.

Osborn vs. Froyseth, 216 U. S., 571.

Certainly, if under the pre-emption and homestead laws a settler's claim is valid against a previous executive withdrawal not authorized by statute, then by stronger reason, in view of the policy of the government as heretofore discussed, a right properly initiated and perfected by a qualified person under the mining laws will be protected against an executive withdrawal not authorized by any precedent statute.

V.

The Possible Scope of Executive Power in the Matter of Withdrawals of Public Lands.

We have already made reference to the new edition of Lindley on Mines. That author, while holding, as we have heretofore shown, that the order of with-

drawal of September 27, 1909, was invalid, yet recognizes certain contentions such as are made by the appellant in this cause. He distinguishes them, however, from the question which is now before this court. Mr. Lindley says :

“The right of the executive to place any part of the public domain in a state of temporary reservation for a *definite public use* in the furtherance of any purpose *recognized by existing law* or sanctioned either by *governmental necessity* or by a *well-established public policy* may not be seriously questioned. For example, the courts have held that the executive might without special legislative authority withdraw lands for a lighthouse [*Wilcox v. Jackson*]; for military purposes [*Grisar v. McDowell*]; for aiding in the improvement of a navigable river [*Wolcott v. Des Moines Co.*]; or to abide the adjustment of disputes between conflicting claimants to the public lands [*Wolsey v. Chapman*]. It may also be considered as well settled that where congress invests the executive with power to create permanent reservations of any class, the power to temporarily place areas in a state of reservation with a view to ultimate permanency may be implied as being in aid of an unquestioned public purpose. But we think it will be readily recognized that the power of withdrawal is not an arbitrary one [*Sjoli v. Dreschel*]; that in its exercise the executive cannot impinge upon the powers of congress

to regulate and control the disposition of the public lands or establish a definite policy regarding such disposition in advance of some declaration by the legislative branch of the government."

1 Lindley on Mines (3d ed.), sec. 200b,
p. 436.

In our former brief we discussed each one of the cases cited by Mr. Lindley. We showed that in *Wilcox vs. Jackson* there was previous statutory authority. *Grisar vs. McDowell* involved a small parcel of land—the "Presidio"—actually occupied by the government for military purposes at the time plaintiff's rights accrued. In *Wolcott vs. Des Moines Company* the Secretary had "not only the power but the duty" to reserve the lands embraced within the grant, and it devolved upon him to construe the grant and determine its scope. In *Wolsey vs. Chapman*, referring to the same grant, it was "*conceded* that the lands in controversy were actually reserved from sale by *competent authority* when the selection was made." (101 U. S., 768.)

We also contended, however, in our former brief, that even if it be true that the President has power, not founded on statute, to appropriate and take possession of particular tracts of land for specific public purposes, this was no argument in support of a power to withdraw from the operation of existing laws the entire mineral oil domain by an order which makes no appropriation for any purpose, takes no possession of any land, and devotes no land to a public use. (Former brief, pp. 73 *et seq.*) Even if it be true that the President may withdraw a particular tract of land by

reason of some doubt in his mind as to the effect of some statutory provision (e. g., the scope of a grant), pending congressional action which would resolve the doubt, yet, where there is no doubt as to the meaning of a statute, a general withdrawal of lands with a view to obtaining a change in the laws by "proposed legislation," in order to carry out the executive idea as to a *future* public policy, cannot be sustained by any like principle. There is no ambiguity in the act of May 10, 1872, or in the act of February 11, 1897; it is not claimed that there is any question of doubt as to the meaning of these statutes, and the announced purpose of the withdrawal order of September 27, 1909, related only to "proposed legislation" concerning the use and disposition of petroleum lands.

Moreover, the public purpose which will support a withdrawal of public lands from the operation of existing laws must, in any event, be a declared and accepted public purpose, not merely declared by the person who then happens to hold the executive office, but be so declared by legislative action; for public purposes of the character we are here discussing can only be such as are recognized by the laws of the land. The act of June 25, 1910, permits withdrawals to be thereafter made for certain designated purposes, and for "other public purposes," but requires that the purpose, whatever it is, shall be "specified in the orders of withdrawal."

We respectfully submit that "proposed legislation," the proposal coming only from the executive department, is not a "public purpose" within the meaning of those words as used in any statute, or as in any way recognized by Congress. Congress, hav-

ing the exclusive power to dispose of, and make all needful rules and regulations respecting, the property, including the public lands, of the United States, is, clearly, the only authority which can designate any public purpose for which such lands may be withheld from the operation of laws which Congress has enacted.

JOEL F. VAILE,
HENRY MCALLISTER, JR.,
KARL C. SCHUYLER,
Solicitors for Appellees.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 750.

THE UNITED STATES OF AMERICA, APPELLANT,

V8.

THE MIDWEST OIL COMPANY, ET AL., APPEL-
LEES.

*On Record Certified to the Supreme Court from the
United States Circuit Court of Appeals for the
Eighth Circuit on Appeal from the District Court
of the United States for the District of Wyoming.*

BRIEF AND ARGUMENT ON BEHALF OF THE
APPELLEES.

A. M. STEVENSON,
LEE CHAMPION,
Of Counsel.

JOEL F. VAILE,
HENRY MCALLISTER, JR.,
WILLIAM N. VAILE,
KARL C. SCHUYLER,
WALTER F. SCHUYLER,
Solicitors for Appellees.



ABSTRACT OF ARGUMENT AND INDEX

	Page
STATEMENT OF ISSUES.....	1-6
ARGUMENT	5-159
Condensed Statement of Argument.....	5-9
I. The scope and character of the withdrawal order of September 27, 1909, shows that it was not an appropriation of specific lands for public use, but it was, avowedly, for the purpose of preventing the acquisition of public oil lands by qualified citizens under existing statutes, pending efforts to obtain a change of law.....	9-23
1. The scope and character of the order of withdrawal.....	9-13
2. The purpose of the withdrawal.....	14-23
II. The public oil lands of Wyoming included within the withdrawal order of September 27, 1909, were not intended to be reserved for naval uses, and the only reason for their withdrawal was to prevent their acquisition by qualified citizens under existing statutes.....	24-29
III. The President has no power to change, or to suspend the operation of, a law of the United States.....	29-36
IV. Under what sanction and to what extent has the President or the Secretary of the Interior the power to withdraw public lands from <i>non-mineral</i> entry under existing laws?.....	36-73
1. The executive power is dependent on congressional authority	37-40
2. Views of executive officers as to the source of their authority to make withdrawals of public lands.....	40-48
3. Judicial decisions are adverse to the independent executive power asserted by appellant.....	48-62
4. The Des Moines River cases do not militate against the contention of appellees.....	62-72
V. Under what sanction and to what extent has the President power to reserve public lands for public uses?.....	73-100
VI. Any executive duty to <i>protect</i> the property of the United States will not warrant an order withdrawing the entire mineral-oil domain from the operation of laws which Congress has enacted, and which remain in full force.....	101-103
VII. The words contained in certain acts providing for agricultural entries or making grants of land, which except therefrom "lands reserved by proclamation of the President," or "by order of the President," or "by competent authority," will not sustain an order which withdraws the public mineral domain from the operation of existing statutes.....	104-110

	Page
VIII. Prior to June 25, 1910, neither the President nor the Secretary of the Interior had any power to withdraw public mineral-oil lands from location or entry under existing mining laws	110-130
1. Prior to 1866 Congress itself had reserved all mineral lands from sale, and this congressional reservation left no opportunity during that period for any withdrawal of mineral lands by executive authority.....	111-115
2. Since July, 1866, the mining laws have contained complete and exclusive provisions as to the control and disposition of public mineral lands.....	115-123
3. Origin of the practice of withdrawing large areas of public lands from the operation of existing laws.....	124-127
4. No "long-continued practice" or "customary usage" can be found to support the withdrawal of mineral lands from the operation of existing laws.....	127-130
IX. The act of June 25, 1910, did not validate any previous withdrawal, it did not authorize the ratification or confirmation of any such previous withdrawal, and the withdrawal order of July 2, 1910, did not affect any rights previously acquired under existing mining laws.....	131-144
1. The act did not validate, or authorize the validation of, any previous withdrawals.....	131-139
2. The attempted ratification of previous withdrawals contained in the order of July 2, 1910, is void.....	140-144
X. Prior to the approval of the act of June 25, 1910, appellees' grantors had acquired vested rights in the property in controversy, and on June 25, 1910, these rights could not be affected even by an act of Congress, much less by an executive order	144-149
XI. Sundry comments on the argument of appellant.....	149-155
1. Appellant's dependence on a "possible hypothesis".....	149
2. Was there an "emergency"?.....	150
3. Effect of pendency of bills in Congress.....	150-151
4. <i>Re</i> congressional approval of <i>policy</i>	152
5. Slowness of congressional processes.....	152-153
6. Necessity (?) of "celerity" and "secrecy in preparation".....	153-155
XII. The decision and opinion of this court will determine for the future the proper constitutional exercise of governmental functions of greatest importance.....	155-159
CONCLUSION	159
APPENDIX	161-171
SECOND APPENDIX	173

TABLE OF CASES CITED

	Page
Atlantic & Pacific R. R. Co., 6 L. D., 84.....	42, 59
Behrends vs. Goldsteen, 1 Alaska, 518.....	128
Belk vs. Meagher, 104 U. S., 279.....	146
Brandon vs. Ard, 211 U. S., 11.....	51, 60
Bullard vs. Des Moines R. R., 122 U. S., 167.....	68, 151
Cantwell vs. Owens, 14 Md., 215.....	107
Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79.....	122
Covington vs. Kentucky, 173 U. S., 231.....	84
Deffeback vs. Hawke, 115 U. S., 392.....	32, 113, 118
Dickenson vs. Fletcher, L. R., 9 C. P., 1.....	108
Donnelly vs. U. S., 228 U. S., 243.....	98
Dubuque & Pac. R. Co. vs. Litchfield, 23 How., 66.....	62, 67, 93
Edrich's Case, 5 Rep., 118; 77 Eng. Rep. (Reprint), 238.....	108
Florida Town Imp. Co. vs. Bigalsky, 44 Fla., 771 (33 So. Rep., 450).....	81
Floyd Acceptances, 7 Wall., 666.....	122, 149
Fort Boise Hay Reservation, 6 L. D., 16.....	121
Gibson vs. Anderson, 131 Fed., 39.....	83, 87, 91, 128
Gibson vs. Chouteau, 13 Wall., 92.....	39
Grisar vs. McDowell, 6 Wall., 363.....	79, 81, 93, 95, 104
Gwillim vs. Donnellan, 115 U. S., 45.....	147
Harvey vs. Tyler, 2 Wall., 328.....	137
Hawaiian Islands, 29 L. D., 32.....	82
Hewitt vs. Schultz, 180 U. S., 139.....	49
Homestead Co. vs. Valley R. R. Co., 17 Wall., 153.....	68
Hoyt vs. Weyerhaeuser, 161 Fed., 324.....	58
Johnson vs. U. S., 225 U. S., 405.....	109
Kendall vs. U. S., 12 Pet., 524.....	31, 103, 121
Leecy vs. U. S., 190 Fed., 289.....	53-55
Lockhart vs. Johnson, 181 U. S., 516.....	52, 60
Manuel vs. Wulff, 152 U. S., 505.....	148
Marbury vs. Madison, 1 Cranch., 137.....	32, 122
McConnell vs. Wilcox, 1 Scam., 344.....	74, 120
McEwen vs. Den, Lessee, 24 How., 242.....	136
McFadden vs. Mt. View M. Co., 97 Fed., 670.....	88
Merryman, ex parte, 17 Fed. Cases, No. 9487 (Taney, 246).....	32, 37
Morrill vs. Jones, 106 U. S., 466.....	34
Moser vs. Newman, 6 Bingham, 556; 130 Eng. Rep. (Reprint), 1395..	108
Murray vs. Gibson, 15 How., 420.....	136
Neagle, In re, 135 U. S., 1.....	102
Nelson vs. Northern Pac. R. R. Co., 180 U. S., 108.....	56, 84
Newhall vs. Sanger, 92 U. S., 761.....	115

	Page
Northern Pac. R. R. Co. vs. Davis, 19 L. D., 87.....	41
Northern Pac. R. R. Co. vs. Miller, 7 L. D., 100.....	43, 93
Noyes vs. Mantle, 127 U. S., 348.....	147
Orr vs. Quimby, 54 N. H., 590.....	85
Osborn vs. Froyseth, 216 U. S., 571.....	57
Paulina's Cargo, The, 7 Cranch., 52.....	106
Rich vs. Keyser, 54 Pa. St., 86.....	107
Scott vs. Carew, 196 U. S., 100.....	85, 86, 129
Shaw vs. Kellogg, 170 U. S., 312.....	33
Sjoli vs. Dreschel, 199 U. S., 564.....	56
Sohn vs. Waterson, 17 Wall., 596.....	137
Southern Pac. R. R. Co. vs. Bell, 183 U. S., 675.....	50, 60
Spalding vs. Chandler, 160 U. S., 394.....	90
Twenty Per Cent Cases, 20 Wall., 179.....	137
United States vs. Eaton, 144 U. S., 677.....	34
United States vs. Fitzgerald, 15 Pet., 407.....	38
United States vs. Gear, 3 How., 120.....	113, 119
United States vs. George, 228 U. S., 14.....	35, 121
United States vs. Grand Rapids etc. Co., 154 Fed., 131.....	88
United States vs. Gratiot, 14 Pet., 526.....	38, 113
United States vs. Leathers, 6 Sawy., 17 (26 Fed. Cases, pp. 898-899) ..	87
United States vs. Martin, 14 Fed., 817.....	88
United States vs. Nicoll, 1 Paine, 646 (27 Fed. Cases, No. 15,879) ..	32, 37
United States vs. Payne, 8 Fed., 883.....	83, 87
United States vs. Perry, 50 Fed., 743.....	109
United States vs. Tichenor, 12 Fed., 415.....	80
United States vs. United Verde Copper Co., 196 U. S., 207.....	34, 121
Van Brocklin vs. State of Tennessee, 117 U. S., 151.....	38
Weyerhaeuser vs. Hoyt, 219 U. S., 380.....	58
Wilcox vs. Jackson, 13 Pet., 498.....	74, 76-78, 91, 105
Williams vs. Baker, 17 Wall., 144.....	64
Williams vs. Lash, 8 Gil. (Minn.), 496.....	85
Williamson vs. U. S., 207 U. S., 425.....	34, 54
Wilson, In re, 140 U. S., 575.....	89
Wisconsin R. R. Co. vs. Price County, 133 U. S., 496.....	39
Wolcott vs. Des Moines Co., 5 Wall., 681.....	62, 63, 64
Wolsey vs. Chapman, 101 U. S., 755.....	64
Yosemite Nat. Park, 25 L. D., 48.....	148

CITATIONS OF STATUTES AND CONSTITUTION

(See Also Appendix, pp. 161-171)

	Page
Revised Statutes, sec. 441.....	34, 53
Revised Statutes, sec. 453.....	34
Revised Statutes, sec. 463.....	53
Revised Statutes, sec. 2318.....	116
Revised Statutes, sec. 2319.....	6, 116, 147
Revised Statutes, sec. 2322.....	147
Revised Statutes, sec. 2329.....	7, 117
Revised Statutes, sec. 2395.....	111
Revised Statutes, sec. 2461.....	21
1 Stat. L., 464 (1796).....	111
1 Stat. L., 554 (1798).....	76
2 Stat. L., 280 (1804).....	112
2 Stat. L., 402 (1806).....	77
2 Stat. L., 445 (1807).....	86
2 Stat. L., 448 (1807).....	112
3 Stat. L., 347 (1817).....	19
3 Stat. L., 431 (1818).....	96
4 Stat. L., 242 (1827).....	20
4 Stat. L., 472 (1831).....	21
4 Stat. L., 687 (1834).....	97
5 Stat. L., 456 (1841).....	65
9 Stat. L., 77 (1846).....	66
9 Stat. L., 396 (1849).....	113
10 Stat. L., 238 (1853).....	95
10 Stat. L., 608 (1855).....	96
11 Stat. L., 10 (1856).....	66
12 Stat. L., 773 (1863).....	61
14 Stat. L., 43, 67 (1866).....	116
14 Stat. L., 251 (1866).....	116
16 Stat. L., 217 (1870).....	117
17 Stat. L., 91 (1872).....	116
29 Stat. L., 526 (1897).....	3, 7, 117, 118, 119, 122
36 Stat. L., 847 (1910).....	3, 135-6, 137
37 Stat. L., 497 (1912).....	139
Constitution, Art. II, sec. 2.....	121
Constitution, Art. IV, sec. 3.....	38
Constitution, Fifth Amendment.....	149

SUNDRY REFERENCES

	Page
Annals, Fourteenth Congress.....	19
Barringer and Adams on Mines, 194.....	113
Black, Interpretation of Laws, p. 191.....	106
Brewster, Attorney-General, Opinion re Indian Reservations (17 Op. Attys. Gen., 260).....	82
Cong. Rec., Vol. 45, pp. 7474-7475.....	138
Garfield, Secretary, Report for 1908.....	44, 124
Geological Survey, Bulletin 537, pp. 38, 39.....	10, 22, 26
House Hearings, H. R. 24070.....	17
H. R. 24070, 61st Congress.....	134-135
Knox, Attorney-General, Opinion (23 Op. Attys. Gen., p. 589).....	44
Lawler, Oscar, Assistant Attorney General, Opinion.....	125
Lindley on Mines, Vol. 1, secs. 33, 34.....	157
Lindley on Mines, Vol. 1, sec. 47.....	114
Lindley on Mines, Vol. 1, secs. 169, 539.....	148
MacVeagh, Attorney-General, Opinion (17 Op. Attys. Gen., p. 163).....	82, 94
Roosevelt, President, Message May 4, 1906.....	14
Secretary Interior, Report 1909.....	14, 18, 28, 131, 132
Secretary Interior, Letter to President, September 17, 1909.....	17, 26
Secretary of Navy, Letter to Secretary Interior, June 25, 1912.....	26
Smith, George Otis, Letter February 24, 1908.....	24
Smith, George Otis, Letter September 17, 1909.....	17, 25
Snyder on Mines, Vol. 1, secs. 451, 466.....	148
Story on Constitution.....	152-153
Taft, President, Message of January 14, 1910.....	14, 46, 125, 133-134
Taft, President, Message of December 6, 1910.....	12, 15, 31, 46, 141-142
Taft, President, Speech at Passaic, N. J., May, 1910.....	126
Wilson's Works, Vol. 1, p. 544.....	153

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 750.

THE UNITED STATES OF AMERICA, APPELLANT,

VS.

THE MIDWEST OIL COMPANY, ET AL., APPEL-
LEES.

*On Record Certified to the Supreme Court from the
United States Circuit Court of Appeals for the
Eighth Circuit on Appeal from the District Court
of the United States for the District of Wyoming.*

BRIEF AND ARGUMENT ON BEHALF OF THE
APPELLEES.

STATEMENT.

The essential facts on which the following discussion will be based may be stated as follows:

On the 27th day of September, 1909, with the approval, and pursuant to the direction, of the President, there was promulgated the following order:

"Temporary Petroleum Withdrawal No. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

Record, p. 8.

[Here follows a description of 3,041,000 acres of land.]

The described 3,041,000 acres of land included 2,871,000 acres in California, and 170,000 acres in Wyoming.

Appellant's Brief, p. 115.

On *March 27, 1910*, William G. Henshaw, Hetty T. Henshaw, Tyler Henshaw, William M. Fitzhugh, Mary E. Fitzhugh, Harry Chickering, Alla S. Chickering, and Henry D. Nichols (grantors of the appellees), designated in the bill as original claimants, entered upon a certain 160 acres of land in the State of Wyoming, included within boundaries described in said "Temporary Petroleum Withdrawal No. 5," and sank a well thereon to great depth, and on or before *May 5, 1910*, encountered large deposits of petroleum by means of said well, and thereupon filed their certificate

of location in the records of the County of Natrona, Wyoming, and, pursuant to the laws of the United States, duly located said lands now in controversy, being the Northeast Quarter of Section Eleven (11), Township Thirty-nine (39) North, of Range Seventy-nine (79) West, of the Sixth Principal Meridian, in the County of Natrona, State of Wyoming.

At the time of the location of said lands there was in force, and still remains in force, the following statutory provision :

“That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims. * * *

Act of February 11, 1897 ; 29 Stat. L.,
526.

On *June 25, 1910*, there was approved by the President an act of Congress, entitled “An Act to authorize the President of the United States to make withdrawals of public lands in certain cases” (36 Stat. L., 847), which statute is set out at large in the bill. The first section of that act provided :

“That the President may at any time in his discretion temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water power sites, irrigation, classifica-

tion of lands or other public uses, to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him, or by an act of Congress."

The second section of the act included a proviso as follows:

"Provided further that this act shall not be construed as a recognition, *abridgment* or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands *after* any withdrawal of such lands made *prior* to the passage of this act." *

Record, p. 3.

Under date of *July 2, 1910*, with the approval of the President, there was promulgated another order of withdrawal, as follows:

"Order of Withdrawal.

Petroleum Reserve No. 8.

It is hereby ordered that those certain orders of withdrawal made heretofore:

On Sept. 27, 1909, and described as temporary petroleum withdrawal No. 5;

On Oct. 12, 1909, and described as temporary petroleum withdrawal No. 6;

On Oct. 12, 1909, and described as temporary petroleum withdrawal No. 7;

* In all quotations in this argument *italics* are ours, unless otherwise noted.

On Oct. 30, 1909, and described as temporary petroleum withdrawal No. 8;

On Feb. 12, 1910, and described as temporary petroleum withdrawal No. 13;

On April 8, 1910, and described as temporary petroleum withdrawal No. 14;

On June 18, 1910, and described as temporary petroleum withdrawal No. 17;
in so far as the same include any of the lands hereinafter described, be, and the same are hereby, ratified, confirmed, and continued in full force and effect; and subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled 'An Act to authorize the President of the United States to make withdrawals of public lands in certain cases,' approved June 25, 1910, there is hereby withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, all of those certain lands of the United States set forth and particularly described as follows, to-wit: "

Record, p. 9.

[Here follows a description of 255,461 acres in the State of Wyoming, including the lands in controversy.]

The following questions are now for consideration by this court:

1. Whether the withdrawal order of September 27, 1909 (made without antecedent congressional authority), was effectual to prevent the lawful acquisition by qualified citizens of mining rights on mineral oil lands in Wyoming included within the lands described in the withdrawal order; and

2. Whether the act of June 25, 1910, or the withdrawal order of July 2, 1910, defeated the rights of the mining locators who had discovered petroleum upon, and had located, the lands in controversy as early as May 5, 1910.

The District Court decided these questions of law in favor of the present appellees and against the government, and entered a decree dismissing the plaintiff's bill. The appellees now contend that that decree should be affirmed.

ARGUMENT.

The appellees contend that the order of withdrawal made by the Secretary of the Interior, with the approval of the President, under date of September 27, 1909, was made without authority of law, and was in every respect null and void. The contention of the appellees may, in general, be condensed into the following propositions:

1. Congress has by law provided:

(a) That "*all valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occu-*

pation and purchase * * * under regulations prescribed by law. * * *

Rev. Stat., sec. 2319.

(b) That "claims usually called 'placers,' including *all forms of deposit*, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; * * *."

Rev. Stat., sec. 2329.

(c) "That any person authorized to enter lands under the mining laws of the United States *may enter and obtain patent* to land containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

Act of February 11, 1897; 29 Stat. L., 526.

2. (a) On and prior to March 27, 1910, the lands in controversy were lands belonging to the United States in which were found valuable mineral deposits—to-wit, deposits of petroleum—and were chiefly valuable therefor.

(b) The original claimants were and are persons authorized to enter lands under the mining laws of the United States.

(c) On or before May 5, 1910, the original claimants discovered said valuable mineral deposits, and duly located the lands containing the same in the manner required by law.

3. Temporary Petroleum Withdrawal No. 5, of September 27, 1909, was intended to, and did, reach all the then known public mineral-oil domain of the United States, and, if valid, had the effect of suspending the operation of the act of February 11, 1897, above quoted.

4. Neither the President nor the Secretary of the Interior has any power to suspend the operation of a law of the United States, unless authorized by statute so to do.

5. Prior to June 25, 1910, Congress had given no authority to the President or Secretary of the Interior to withdraw petroleum or other mineral-oil lands of the United States from the operation of the laws above mentioned.

Therefore :

(1) The attempted executive withdrawal of September 27, 1909, was null and void ; and

(2) The original claimants (grantors of appeals), by exploration of said lands and the discovery of petroleum thereon in paying quantities, and the completion of said discovery and the location of said claim prior to the approval of the act of June 25, 1910, acquired vested rights in the lands so located and on which such discovery was made.

The question submitted to the District Court in this cause was simply as to the sufficiency of the bill. The point was raised by a motion to dismiss, and decree was entered upon that motion, dismissing the bill. Strictly speaking, therefore, the record only presents the law question as to whether the bill upon its face, unaided by any evidence, presents a cause of action. The appellant relies upon numerous documents

not appearing in the record, of which it asks this court to take judicial notice, explanatory of motives which actuated executive officers in recommending, and the President in approving, the order of withdrawal now under consideration.

In view of the broad scope and great importance of the principle involved in this cause, we shall discuss the case on the theory that this court will take no narrow view of the subject, but will welcome light from all sources bearing upon the main question involved, being as to the power of the President prior to the act of June 25, 1910, to withdraw the public mineral-oil domain of the United States from the operation of existing laws, but with special reference to public oil lands in Wyoming. No other lands are involved in this case. We shall, therefore, in the following discussion freely refer to the documents cited by appellant, which it submits to the judicial notice of this court.

I.

The scope and character of the withdrawal order of September 27, 1909, shows that it was not an appropriation of specific lands for public use, but it was avowedly for the purpose of preventing the acquisition of public oil lands by qualified citizens under existing statutes, pending efforts to obtain a change of law.

1. *The Scope and Character of the Order of Withdrawal.*

The language of the withdrawal order is as follows:

"In aid of *proposed legislation* affecting the use and disposition of the petroleum deposits on the public domain, *all public lands* in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the *mineral* or nonmineral *public land laws*."

Record, p. 8; fol. 8.

The order itself purports to cover all public lands within described areas of 3,041,000 acres. The bill itself alleges that the lands in controversy, "in common with many other tracts of the public lands of the United States," were withdrawn from mineral location.

Record, p. 2; fol. 2.

The withdrawal of these oil lands originated in recommendations of the Geological Survey. There has been issued by the United States Geological Survey its Bulletin No. 537, relating to the classification of the public lands, and that Bulletin reviews the subject of the withdrawal of oil lands, including the withdrawal in controversy. The Director of the Geological Survey, Mr. George Otis Smith, at page 38 of said Bulletin, reviews the action of the Interior Department in the withdrawal of oil lands from *agricultural* entry in the years 1907 and 1908; and he then makes the following statement:

"Within a short time it became apparent that the situation was only partly covered by withdrawing oil lands from *agricultural*

entry. The inadequacy of the placer law and its inapplicability to oil lands was clearly recognized. The law was framed to apply to solid minerals; when applied to fluids, such as oil and gas, it at once led to many abuses. Drilling along the boundaries of one claim in order to draw off oil or gas beneath a neighboring claim forced activity in drilling which resulted in production far greater than the demands of the market. The requirement of discovery as a prerequisite to title also forced development and overproduction. It became more and more apparent that oil and gas should be disposed of in terms of barrels or cubic feet rather than in terms of acres. These considerations, together with the advisability of retaining a supply of fuel oil for the use of the Navy, caused the Geological Survey to urge the *suspension of all forms of entry on Government oil lands pending the enactment of new legislation by Congress.* In consequence Secretary of the Interior Ballinger on *September 27, 1909,* withdrew from all forms of entry, location, or disposition *all public lands believed to contain valuable deposits of oil or gas.* As information has since been obtained indicating other public lands to be valuable for these minerals, *they also have been withdrawn* from all forms of disposition under the mineral or nonmineral land laws. * * *

A number of bills providing for the disposal of oil and gas deposits have been introduced in Congress, but none have yet been enacted into law, so that the petroleum withdrawals continue in force and *new ones are being made as occasion arises.*"

Petroleum Withdrawal No. 5 was drafted, even as to its form, by the Geological Survey, and became an effectual executive order merely by the approval endorsed upon that recommendation by the Acting Secretary of the Interior.

Record, p. 8; fol. 8.

President Taft himself stated the scope and reasons for this withdrawal in his message to Congress of December 6, 1910, p. 98; see also Appellant's Brief, p. 117. In that message he incorporated an address which he had made on September 5 of the same year, in which he said:

"In September, 1909 I directed that all public oil lands, whether then withdrawn or not, should be withheld from disposition pending congressional action, for the reason that the existing placer mining law, although made applicable to deposits of this character, is not suitable to such lands, and for the further reason that it seemed desirable to reserve certain fuel-oil deposits for the use of the American Navy. Accordingly, the form of all existing withdrawals was changed and new withdrawals aggregating 2,750,000

acres were made in Arizona, California, Colorado, New Mexico, Utah, and Wyoming."

He then speaks of subsequent restorations and of new withdrawals, with the conclusion that on November 15, 1910, the outstanding withdrawals amounted to 4,654,000 acres.

By reference to the order of Withdrawal No. 8, of July 2, 1910, we find that the only order of withdrawal of oil lands made in September, 1909, was the order of September 27, which is now under consideration.

We have in these statements direct, positive evidence, of which this court will take judicial notice, that it was the intent that the withdrawal should cover *all* public oil lands, and the dominant purpose in making the withdrawal is shown to rest upon the executive opinion that the existing placer-mining law did not provide the best method for the disposition of such lands. We have the direct declaration of the Director of the Geological Survey, who recommended the withdrawal, and the very positive statement to the same effect by the President himself, that this order of September 27, 1909, was intended to cover "*all* public lands believed to contain valuable deposits of oil or gas, and that as other lands were found to be valuable for these minerals they too were withdrawn from all forms of disposition under the mineral or non-mineral land laws." The entire mineral-oil domain of the United States is, upon the recommendation of one bureau chief, and without any suggestion of previous congressional authority, withdrawn from the operation of existing laws.

2. *The Purpose of the Withdrawal.*

It was the view of certain executive officers that there should be a change of law in reference to the method of acquisition of public oil lands.

This suggested change was expressed in President Roosevelt's message of May 4, 1906, where he said:

"The time has come when no oil or coal lands held by the government * * * should be alienated * * * the lands should be leased only on such terms and for such periods as will enable the government to keep entire control thereof."

Cong. Rec., Vol. 40, Part 7, p. 6358.

A like suggestion was expressed in the report of the Secretary of the Interior for the year 1909, in the following words:

"No legislation exists for the entry of oil and gas lands other than the general mining laws of the United States, which are not adaptable to the disposition of lands containing mineral oils and gas."

Report, p. 11.

Later the same idea was set forth in President Taft's message of January 14, 1910, in which he asked Congress "for the enactment of laws amending the *obsolete statutes* so as to obtain governmental control

over that part of the public domain in which there are valuable deposits of coal, of oil, and of phosphate."

Message, p. 4 (61st Cong., H. R. Doc. 533).

Appellant's Brief, p. 116.

In like manner it was set forth in President Taft's message of December 6, 1910, where he says:

"The needed oil and gas law is essentially a leasing law. In their natural occurrence, oil and gas cannot be measured in terms of acres like coal, and it follows that exclusive title to these products can normally be secured only after they reach the surface. Oil should be disposed of as a commodity in terms of barrels of transportable product rather than in acres of real estate."

Message (appendix), 98.

Appellant's Brief, p. 117.

The dominant purpose of the withdrawal was manifestly to withhold public oil lands from the operation of existing laws of Congress, because executive officers were of the opinion that the law ought to be different from what it was. It was clearly intended to deprive citizens of the benefit of existing statutes until Congress should make a change in legislative policy and enact new and different laws. It was, therefore, the suspension of the operation of existing laws, and was intended to be such a suspension until Congress should enact some other law that should agree with the executive view of what the govern-

mental policy should be in reference to the disposition of public oil lands.

The appellant attempts to justify this total withdrawal of the entire public mineral-oil domain from the operation of existing laws by the fact that in discussions between executive and administrative officers there was presented, as an incidental object to be accomplished, a so-called public use—to-wit, the assuring of a supply of fuel oil for the uses of the national navy. No such purpose was declared in the order of withdrawal. The only purpose set forth in that order was "in aid of proposed *legislation* affecting the use and disposition of the petroleum deposits in the public domain." The withdrawal made was not a reservation or appropriation of oil lands for uses of the navy. Its object was to withhold the land from any alienation until there could be *legislation*, which legislation, it was expected, would provide for the use and disposition of these petroleum deposits.

Before it would be possible for such lands to be utilized for naval purposes, an entire change of legislative policy would be necessary. The government has always been in the habit of buying its fuel supplies upon the market, and not producing them from its public lands by its own agencies. But, in order that the so-called public use—to-wit, the uses of the navy—may justify the withdrawal of mineral-oil lands from the operation of existing laws, it manifestly requires a *legislative change* in a long-continued government policy.

This situation is recognized by executive officers in the various communications which the appellant submits to the judicial notice of this court, and is also apparent from the action taken by the President.

Mr. George Otis Smith, Director of the Geological Survey, in his letter to the Secretary of the Interior of September 17, 1909, says:

"I would therefore renew my recommendation that *pending the enactment of adequate legislation on this subject the filing of claims to oil land in the State of California be suspended.*"

House Hearings on H. R. 24070, pp.
97-98.

The Secretary of the Interior, in his letter of the same date (September 17) to the President, says:

"The time appears opportune for legislative action that will assure the conservation of an adequate supply of petroleum for the government's own needs. *This legislation should give authority to fix the terms of disposition of public oil lands so as to provide for the future demands of the Navy,*
• • •

In aid of *such legislation*, and, indeed, as essential to the accomplishment of its purpose, all the lands hereinbefore mentioned should be temporarily withdrawn from all forms of filing, entry or disposal, including mineral entry."

Id., pp. 98-99.

Appellant's Brief, p. 114.

Acting Secretary Pierce, in his telegram to Secretary Ballinger of September 26, 1909, says:

"My withdrawal prevents all forms of acquisition in future, and holds the land in statu quo *pending legislation*."

The Secretary of the Interior, in his report for 1909 (p. 11), says:

"I desire to call attention to the importance of asking *Congress to authorize* the Executive to reserve certain areas of these lands for the purpose of affording a supply of fuel oil for the future use of the Navy."

Appellant's Brief, p. 115.

The President, upon these recommendations, authorized the withdrawal order solely in aid of *proposed legislation*.

It is very clear from these citations that even in the view of executive officers the reservation of mineral-oil lands for naval purposes was not a "public purpose" for which reservation or appropriation could be immediately made, but that a change of laws was necessary in order to make it such a public purpose. *Legislative* action of the character suggested had statutory precedent; as, for illustration, the act passed by Congress in 1817 (3 Stat. L., 347), giving to the President authority to make reservations of public lands to supply timber for naval purposes.

The history of the act last cited, and of subsequent acts upon the same subject, furnishes valuable precedents for the course which should have been pursued in this case, if oil lands were to be reserved for the use of the navy.

In the Fourteenth Congress Senator Morrow introduced into the Senate, and the Senate adopted, a resolution as follows:

"Resolved that the Committee on Public Lands be directed to inquire into the expediency of providing *by law* for the reservation from sale of such portions of the public lands producing the live oak and red cedar timbers as may be necessary to afford a sufficient supply of those timbers for public naval architecture, and also the measures proper for preventing waste and damage on the same, and that they report by bill or otherwise."

Annals 14th Congress, Second Session,
p. 37.

Pursuant to a report presented in accordance with this resolution, the act of March 1, 1817, was enacted (3 Stat. L., 347), the first section of which reads as follows:

"That the Secretary of the Navy be authorized, and it shall be his duty, under the direction of the President of the United States, to cause such vacant and unappropriated lands of the United States as produce the live oak and red cedar timbers to be explored, and selection to be made of such tracts or portions thereof, where the principal growth is of either of the said timbers, as in his judgment may be necessary to furnish for the navy a sufficient supply of the

said timbers. The said Secretary shall have power to employ such agent or agents and surveyor as he may deem necessary for the aforesaid purpose, who shall report to him the tracts by them selected, with the boundaries ascertained and accurately designated by actual survey or water courses, which report shall be laid before the President, which he may approve or reject in whole or in part; and the tracts of land thus selected with the approbation of the President, shall be reserved unless otherwise directed by law, from any future sale of the public lands, *and be appropriated to the sole purpose of supplying timber for the navy of the United States: Provided, That nothing in this section contained shall be construed to prejudice the rights of any person or persons claiming lands which may be reserved as aforesaid.*"

In the act of March 3, 1827 (4 Stat. L., 242), it was enacted by section 3 of the act :

"That the President of the United States be and he is hereby authorized to take the proper measures to preserve the live oak timber growing on the lands of the United States, and he is also authorized to reserve from sale such lands belonging to the United States as may be found to contain live oak or other timber in sufficient quantity to render the same valuable for naval purposes."

By act of March 2, 1831 (4 Stat. L., 472), penalties were imposed for the wanton destruction of any live oak or red cedar trees or other timber—

“on any lands of the United States which in pursuance of any law passed or hereafter to be passed shall have been reserved or purchased for the use of the United States for supplying or furnishing therefrom timber for the navy of the United States.”

The provisions of the act last mentioned have become incorporated in section 2461 of the Revised Statutes, which provides penalties for cutting timber on any lands of the United States “which in pursuance of any law passed or hereafter to be passed have been reserved or purchased for the use of the United States,” etc. In this history of the reservation of timber for naval uses we find a careful observance of the constitutional distribution of powers as between the legislative and executive departments, and the action then taken furnishes instructive precedents for the course that should have been pursued in the case now under consideration. Under these statutes Congress made provision, in advance of executive action, giving power to the President to reserve lands for naval purposes. The action taken is inconsistent with any *implied* power of the President to reserve lands without the aid of previous legislation by Congress.

The appellant has appended to its brief, among other documents, a table of bills introduced into Congress relating in one way and another to the disposition of public lands. They are twenty-three in number, running from March 22, 1909, to April 18, 1910.

Any member of Congress may introduce a bill upon any subject, and it is very apparent that the mere pendency of bills for consideration by Congress is in itself no suggestion of the congressional purpose; and yet a congressional purpose cannot be manifested except by a bill which is ultimately enacted into law. Now, it will be observed by an examination of this list of twenty-three bills so listed by appellant that there is not one which purports to provide for a change in the policy of the government in reference to the supply of fuel for naval uses. This is admitted by appellant (Brief, p. 13).

That the uses of the navy, in any event, constitute but a small factor in the withdrawal of the public oil lands from location or entry becomes very apparent when we see what was done after the enactment of the law of June 25, 1910. It will be remembered from citation already made that in September, 1909, the President had directed that *all* public oil lands should be withheld from disposition, and that on November 15, 1910, the outstanding withdrawals amounted to 4,654,000 acres. But the Director of the Geological Survey, in Bulletin 537, already cited, at page 39, says:

"The need of the Navy for a supply of fuel oil has recently been more strongly recognized, the battleships last authorized being designed to burn oil exclusively. *Fully to insure the Nation an adequate supply of fuel oil*, two naval petroleum reserves aggregating 68,249 acres and estimated to contain at least 250,000,000 barrels of oil have been created in the San Joaquin Valley fields of California, one under date of September 2,

1912, and the second under date of December 13, 1912."

It would seem, therefore, that out of the 4,654,000 acres which had theretofore been withdrawn from location, the relatively trifling amount of 68,249 acres was sufficient "fully to insure the Nation an adequate supply of fuel oil." In other words, less than one and one-half per cent of the total withdrawals made was amply sufficient to assure the nation an adequate supply of fuel oil for naval uses. The remaining ninety-eight and one-half per cent of the total withdrawals must, therefore, rest solely upon the proposition that in the opinion of the executive the existing mining laws were not adapted to the disposition of oil lands, and that no entry should be made under the same pending an effort to change such laws.

Not only is this true, but, whether we take the one purpose or the other—the purpose to change the method of permitted acquisition of oil lands, or the purpose of ultimately reserving oil lands for the uses of the navy—in either and in both events what was desired and what was requisite to accomplish the executive intent was a *change of existing law*. But the question of a change of existing law is a question exclusively for Congress, as we shall hereafter more fully discuss. And when the President by executive order withholds the entire public mineral-oil domain from entry under existing laws, because he thinks those laws ought to be changed, the inevitable conclusion is that he is attempting to suspend the operation of laws which Congress has enacted, because he believes such laws unwise.

II.

The public oil lands of Wyoming included within the withdrawal order of September 27, 1909, were not intended to be reserved for naval uses, and the only reason for their withdrawal was to prevent their acquisition by qualified citizens under existing statutes.

The little tract of 160 acres in controversy in this action was not in itself and by itself selected as a specific object of withdrawal. It happens to be included within the boundaries of 170,000 acres of Wyoming lands withdrawn by the order of September 27, 1909, and within the 255,461 acres in Wyoming covered by the withdrawal of July 2, 1910.

If now we look to the various documents which the appellant brings before this court for consideration, we find nothing whatever to suggest the use of Wyoming oil lands as a reservation for the production of oil for naval uses. And, on the contrary, these documents show that the only lands contemplated to be used for such purposes were lands in California.

The lands in controversy are situated in the State of Wyoming, 1,500 miles from tide-water. But in the State of California, on the Pacific coast, close to tide-water, is situated an immense area of valuable oil-bearing land—a fact already then well known to the government through the reports of the Geological Survey. And it was to these lands in California that all the recommendations of executive and administrative officers as to reservations for naval use were directed.

On February 24, 1908, Director George Otis Smith recommended that the filing of claims to oil lands in the State of *California* be suspended in order

that the government might continue ownership of valuable supplies of liquid fuel in that region.

Appellant's Brief, p. 108.

Under date of September 17, 1909, in a letter to the Secretary of the Interior, Director Smith, referring to instructions which had been previously issued to registers and receivers to withhold oil lands from agricultural entry in *California*, makes this statement:

"The area of oil land affected by this action is about 427,000 acres, to at least 40 per cent. of which the government retains title. In several townships * * * there are compact areas of unappropriated oil land, each including from 6 to 16 contiguous sections."

Appellant's Brief, p. 111.

In a letter of the same date to the President, the Secretary of the Interior refers to the withdrawal of 430,000 acres of oil land in *California* from agricultural entry, and states:

"Furthermore, there is at present withdrawn in *California*, pending examination and classification by the Geological Survey, which work is now in progress, approximately 1,650,000 acres, of which 1,250,000 acres are withdrawn from all entry."

Appellant's Brief, pp. 113, 114.

By letter from the Acting Secretary of the Navy to the Secretary of the Interior, of June 25, 1912, he says:

"I am informed that there is in *California* on public lands withdrawn from entry oil estimated at four billion barrels."

He then further says:

"This department therefore earnestly requests the co-operation of the Department of the Interior to secure a definite reservation for the Navy, by Executive order, of oil-bearing public lands in *California* sufficient in extent to insure a supply of 500,000,000 barrels."

Appellant's Brief, pp. 122, 123.

The two withdrawals that were in fact made for naval uses were of lands in *California*—one under date of September 2, 1912, and the other under date of December 13, 1912, and aggregating 68,249 acres, hereinabove mentioned. (Bulletin No. 537, p. 39.)

In all the recommendations preceding the withdrawal order of September 27, 1909, there was no suggestion of the necessity of a reservation for naval uses of any oil lands in Wyoming, and the Wyoming lands are brought within the scope of the withdrawal order only by the list furnished by the Director of the Geological Survey, and incorporated in the withdrawal on September 27.

The recommendation by the Secretary of the Interior to the President, under date of September 17, 1909, related solely to oil lands in *California*.

Appellant's Brief, p. 112.

And, after referring specifically to these California lands, and at the conclusion of his letter, the Secretary says:

"It is believed that such legislation would not interfere with the profitable development and utilization of the *California* oil pools.

In aid of such legislation, and, indeed, as essential to the accomplishment of its purpose all the lands *hereinbefore mentioned* should be temporarily withdrawn from all forms of filing, entry, and disposal, including mineral entry."

Appellant's Brief, p. 114.

The lands here referred to as "hereinbefore mentioned" were California lands only. There was no allusion to lands in Wyoming.

Immediately after sending that letter, it seems that the Secretary went west and met the President, who was then on a journey, at Salt Lake City, and from there, on September 26, wired to Acting Secretary Pierce:

"Have conferred with President respecting temporary withdrawals covering oil lands. If present withdrawals permit mining entries being made of such lands wish the withdrawals modified at once to prohibit such disposition pending legislation."

Appellant's Brief, p. 115.

And thereupon the Director of the Geological Survey prepared the order of withdrawal, and, in doing so, included the oil lands in Wyoming, which had not been covered by any recommendations or correspondence.

In the light of the preceding quotations, there is no doubt as to the meaning of the Secretary of the Interior and the President in their recommendations made to Congress. In the report of the Secretary of the Interior for 1909, after giving a table of withdrawals of oil lands with a view of obtaining new legislation from Congress, he says:

"I desire to call attention to the importance of asking Congress to authorize the Executive to reserve *certain* areas of these lands for the purpose of affording a supply of fuel oil for the future use of the Navy."

Report, p. 11.

And the President in his message of December 6, 1910, already quoted, stated as a "further reason" for his recommendation of additional legislation that it seemed desirable to reserve *certain* fuel oil deposits for the use of the American navy. In both cases it is apparent from the associated documents that the "certain areas" and the "certain fuel oil deposits" referred to were located in the State of *California*, and were none of them located in the State of Wyoming.

All known oil lands in Wyoming had been withdrawn from *agricultural entry* as early as April 1, 1903, and the continuance of the withdrawal was approved by the Acting Secretary of the Interior on July 26, 1909. These withdrawals were "in order

that parties might have opportunity to develop the land for alleged oil deposits."

(See Second Appendix, *post* p. 173.)

There is nothing whatever alleged in the bill in this case, there is nothing whatever set forth in any of the documents of which the court is asked to take judicial notice, to show that any of the Wyoming oil lands were desired by the executive department to be reserved for naval uses of the government. The conclusion seems inevitable that, so far as the lands in controversy are concerned, the only purpose of the withdrawal order was to prevent the alienation of these oil lands under the methods then provided by law, and to prevent their acquisition by citizens until the laws should be changed.

In the following discussion it is an order of this character that we have to consider; and the actual question before us really is: Did the President, prior to the act of June 25, 1910, have lawful power to withdraw the *entire public mineral-oil domain in the State of Wyoming* from the operation of the existing laws merely because, in his opinion, such laws did not provide the best method for the acquisition of oil lands by qualified citizens? Whatever other considerations may affect cases relating to *California* lands, the one question in *this case* is: Did the President have the power to deprive citizens of rights given them by law, pending his efforts to obtain a change of law as to the method of private acquisition of public mineral-oil lands?

III.

The President has no power to change, or to suspend the operation of, a law of the United States.

This proposition, under our form of government, would seem to be axiomatic; and yet it is manifest that the withdrawal order of September 27, 1909, was an attempt so to suspend the operation of laws of Congress.

The *law* says that all mineral lands *shall* be open to exploration, occupation, and purchase. The *order* says that the mineral lands mentioned therein, covering the entire known mineral-oil domain, and including the lands here in controversy, shall *not* be open to exploration, occupation, or purchase.

The law says that any person authorized to enter lands under the mining laws of the United States *may* enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims.

The President's order says that, although a person is so authorized, yet he shall *not* make any form of location, settlement, selection, filing, entry, or purchase under the mineral laws of the United States as to any of the lands described in the order, meaning all lands then known to contain petroleum.

Existing legislation authorized such entries upon public lands. The President's order prohibited such entries pending *prospective* legislation.

President Taft himself fully understood that withdrawal orders of this character had the effect "*to suspend the action of the existing laws,*" for he

subsequently used these very words in reference to like withdrawals.

Message of December 6, 1910, p. 57.

The general principles applicable to this question were enunciated very early in the history of the government. In a case before this court it appears that the Postmaster General had refused to recognize an award made pursuant to statute by the Solicitor of the Treasury, and this court, when the question came before it, stated one of the arguments in favor of the Postmaster General, and answered it in the following manner:

"It was urged at the bar that the Postmaster-General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support, in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.

To contend that the obligation imposed on the President to see the laws faithfully

executed implies a power *to forbid their execution*, is a novel construction of the constitution, and entirely inadmissible."

Kendall vs. United States, 12 Peters, 524, 612-613.

See also :

Marbury vs. Madison, 1 Cranch, 137, 166.

"Our government being a government of laws, it speaks to its agents through its laws, and it is to them only that we are to look for the authority of such agents."

United States vs. Nicoll et al., 1 Paine, 464; 27 Fed. Cases, No. 15879.

"The government of the United States is one of delegated and limited power; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted."

Ex parte Merryman; Taney, 246; 17 Fed. Cases, No. 9487.

In *Deffebach vs. Hawke*, 115 U. S., 392, 406, this court, speaking of the authority of the Land Department (over which the Secretary of Interior presides) over patents to mineral lands, said :

"The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of convey-

ance, with recitals showing a compliance with the law and the conditions which it prescribed. * * * The act of Congress of May 10, 1872, contemplates the purchase of the land on which valuable mineral deposits are found; and its provisions in this respect are retained in the Revised Statutes, Sec. 2319."

And in the later case of *Shaw vs. Kellogg*, 170 U. S., 312, 337, speaking on the same subject, the court said:

"We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. *Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal.*"

In a later case, speaking of the Secretary of the Interior himself, this court has used some very emphatic language in reference to his power to make regulations relating to the use of timber from the public lands under a statute which provided that all citizens of the United States resident in certain states and territories were authorized and permitted to fell and remove timber from public mineral lands for building, agricultural, mining, or other domestic purposes. The Secretary, by his Regulation No. 7 under this act, had provided that "no timber is permitted to be used for smelting purposes, smelting being a sepa-

rate and distinct industry from that of mining." The Supreme Court held otherwise, and uses this language :

"If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; *it is legislation*. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given, and has entrusted to the Secretary the power to regulate the exercise of the license, *not to take it away*. There is, undoubtedly, ambiguity in the words expressing that power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them or invest the Secretary of the Interior with the power of legislation."

United States vs. United Verde Copper Co., 196 U. S., 207, 215.

See also :

Morrill vs. Jones, 106 U. S., 466.

U. S. vs. Eaton, 144 U. S., 677.

Williamson vs. U. S., 207 U. S., 425,
462.

Referring to Revised Statutes, sections 441, 453, etc., this court has very recently said :

"We insert the sections in the margin. It will be seen that they confer administra-

tive power only. This is indubitably so as to Sections 161, 441, 453 and 2478; and certainly under the guise of regulation, *legislation cannot be exercised*. * * * It is manifest that the regulation adds a requirement which that section does not, and which is not justified by Section 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Section 2291 requires, why not other conditions, *and the disposition of the public lands thus to be taken from the legislative branch of the Government and given to the discretion of the Land Department.*"

U. S. vs. George, 228 U. S., 14, 20.

At this early stage of the argument we respectfully submit: (1) That the withdrawal order of September 27, 1909, was plainly *legislative* in character—it was not "regulation." (2) That the power even to make regulations respecting the public lands rests exclusively in Congress. (3) That executive officers cannot make regulations respecting such lands, except to the extent that Congress by statute has conferred that power upon them. (4) That Congress had not (prior to June 25, 1910) conferred any authority that would sustain executive orders of the character now under discussion. (5) That the act of June 25, 1910, was not in terms or effect a ratification of preceding withdrawals, but merely author-

ized withdrawals *in futuro*. (6) That the withdrawal order of September 27, 1909, was a usurpation of legislative power—was an attempt to suspend the operation of then existing laws—and was outside the range of any constitutional or statutory authority vested in the President.

These contentions will be further elaborated in the pages following.

IV.

Under what sanction and to what extent has the President or the Secretary of the Interior the power to withdraw public lands from NON-MINERAL entry under existing laws?

The case under discussion relates ultimately only to the power of the President to withdraw public oil lands from mineral entry under existing laws, and, as we shall hereafter see, there is a sharp and vital distinction in this respect between mineral and non-mineral rights under the law. But, in view of contentions on behalf of the appellant as to "implied" or "inherent" powers of the executive, it seems necessary first to investigate and analyze the power, and the source of the power, of the President as to withdrawals most frequently made in the past, and these relate to non-mineral land.

The counsel for appellant contend for "implied" power in the President to deal with the public lands in ways not authorized by Congress. They point, indeed, to no clause or single word of the Constitution from which such implication can be derived. In an indefinite and uncertain way they argue that, *by*

necessity, this power so to deal with the public lands vests in the chief executive.

This contention is in violation of principles which have become fundamental in our jurisprudence. It violates the principle long ago announced by Chief Justice Taney, that the government of the United States is one of delegated and limited authority; that it derives its existence and authority from the Constitution, and that neither of its branches, executive, legislative, or judicial, can exercise any of the powers of government beyond those specified and granted. (*Ex parte Merryman, supra.*) Our government speaks to its agents through its laws, and it is to them only that we are to look for the authority of such agents. (*U. S. vs. Nicoll, supra.*)

1. *The Executive Power Is Dependent on Congressional Authority.*

In considering the constitutional distribution of governmental powers as between the executive and the legislative departments, there may be some subjects which are not clearly defined, and which require elaborate consideration to determine whether they lie within the one department or the other. But there is probably no subject upon which the delimitation of powers is more clearly expressed than in relation to the public lands. It is a subject on which the Constitution makes express declaration, and the constitutional provision has been frequently discussed and applied by this court. Its meaning is not ambiguous.

It is provided by the Constitution of the United States that—

"The Congress shall have power to dispose of and make all needful rules and regulations respecting territory or other property belonging to the United States."

U. S. Constitution, Art. IV, sec. 3.

Construing this provision of the Constitution, this court has said :

"The term territory, as here used, is merely descriptive of one kind of property ; and is equivalent to the word *lands*. And Congress has the same power over it as over any other property belonging to the United States ; and this power *is rested in Congress* without limitation."

U. S. vs. Gratiot, 14 Pet., 526, 536-537.

"No appropriation of public land can be made for any purpose but by authority of Congress."

U. S. vs. Fitzgerald, 15 Pet., 407, 421.

"But public and unoccupied lands to which the United States have acquired title
* * * Congress, under the power conferred upon it by the constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' has the *exclusive* right to control and dispose of, as it has with regard to other property of the United States."

Van Brocklin et al. vs. State of Tennessee et al., 117 U. S., 151, 168.

"The constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an *exclusion* of all other authority over the property which could interfere with this right or obstruct its exercise."

Wisconsin R. R. Co. vs. Price County,
133 U. S., 496, 504.

"With respect to the public domain the constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made."

Gibson vs. Chouteau, 13 Wall., 92, 99.

From this plain constitutional provision, as definitely construed by this court, it would seem incontestable that any executive power to deal with the public lands must find its sanction in some law of Congress; that any executive power of restricting the acquisition of such lands by private citizens in the manner permitted by law must find its support in some congressional act which directly or by necessary implication vests such power of restriction in the Executive.

There have been many laws which directly granted such power as to specific *non-mineral* lands. There have been many laws which by necessary implication have vested this power in the Executive under defined limitations. There have been many laws which gave the Executive *discretion* to withdraw lands from entry and to determine what particular lands should be designated for withdrawal. But in all cases the source of the power, whether express or implied, is always found in some congressional action. We confidently contend that there is no independent "inherent" or "implied" authority in the Executive so to deal with public lands. Undoubtedly the congressional authority must often be "construed," and as the executive department has the duty of executing the law and of fulfilling the congressional mandate, the duty of construction first rests upon executive officers. Their construction may in the end prove wrong, but, until corrected by judicial decision, will stand. But whether the congressional mandate be rightly or wrongly *construed*, the executive action assumes previous legislative authority. It finds its sanction only in the action of Congress.

2. *Views of Executive Officers as to the Source of Their Authority to Make Withdrawals of Public Lands.*

Except for certain doctrines (hereinafter mentioned) first announced during the administration of President Roosevelt, the view of executive officers has been that the power to withdraw public lands from

the operation of existing laws depended upon some authority of Congress.

Mr. Hoke Smith, Secretary of the Interior, in one decision said :

"In view of the provision in Article 4 of the Constitution, conferring upon Congress the exclusive 'Power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,' it would seem that there ought to be some legislation, which, either by expression or clear implication, confers upon the executive so important a power as that of withholding public lands from the operation of laws, relating to their disposal, whenever, in the discretion of the executive, it is thought proper to do so—a disposal, be it remembered, expressly reserved by the Constitution to the Congress itself. But in my researches I have not been able to find such legislation.

So great is the power claimed, so far reaching and dangerous may be the results of its exercise, that if the matter were submitted to me as an original proposition, I do not think that I would be warranted in ordering such a withdrawal, in the absence of legislation and entirely upon a supposed power inherent in the Secretary of the Interior."

Northern Pacific R. Co. vs. Davis,
19 L. D., 87, 88 (July, 1894).

Secretary Lamar, afterwards a Justice of this court, in an earlier case uses this language:

"Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise. * * *

Waiving all question as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity lands from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands."

Atlantic & Pacific R. R. Co., 6 L. D.,
84, 87-88 (August, 1887).

Secretary Vilas, in overruling a withdrawal made by the Acting Commissioner of the General Land Office, speaks as follows:

"The extent to which the supreme court has gone in its decisions, and the extent which the reason of the thing supports, appears to be that the President may, in execution or furtherance of a public purpose committed, generally or specially, *by Congress to the Executive* to effectuate, when in his judgment such action is desirable to the accomplishment of that purpose and will not infringe any limiting provision of statute gov-

erning the particular case, withdraw or withhold by his order any portion of the public domain from the operation of the general laws for its disposition, and devote it to such public use subject to review by Congress.

* * * The principle does not, however, contemplate an arbitrary or capricious suspension of the statutes, much less the contravention of a particular mandate, expressed or clearly implied, even by the President's direct act. But it ought not to be presumed, and it seems to me it cannot rightfully be, to support the act of an inferior executive officer, that the President of the United States directed the withdrawal of public lands *beyond the clearly expressed purpose of a statute* or contrary to the clear implication of the negative force of a statute. Such a presumption cannot be rightfully imputed to him, whose official oath obliges, and whose highest function is, to faithfully execute the laws; and if he himself were to make a withdrawal under such circumstances, its validity would be open at least to grave question."

Northern Pacific R. R. Co. vs. Miller,
7 L. D., 100, 112 (August, 1888).

In an opinion rendered by Mr. Knox, when Attorney General, he discussed the control of the public lands, and as to the power of exclusion of citizens therefrom, and, among other things, he says:

"Such right of control and exclusion is incident to ownership and is a part of that

which the owner owns with the land. But it does not follow from this that the Secretary of the Interior may exercise this right of control which resides in the government and may be exercised by Congress. The powers of the head of a department are limited, and are to be exercised generally, and only for the accomplishment of some end or purpose prescribed by law or usage."

Again he says:

"But while Congress might exercise this incident of ownership, it is manifest that the Secretary of the Interior cannot without express authority of law change this long settled policy of the government in favor of the people by rules and regulations forbidding that access to the public domain which this policy has so long permitted, or for purposes within that permission, or not violative of any law."

23 Opinions of Attorneys General, pp. 589, 590.

It remained for a recent Secretary of the Interior to set forth in extreme form the opposite contention.

Secretary Garfield, in his report for the year 1908, uses the following language:

"The public domain has been placed by Congress under the Interior Department, and ample authority is vested in the Chief Executive and the Secretary of the Department to

take such action as is necessary to care for the public domain. During many years the Executive has, in the exercise of this general authority, withdrawn at different times and for various purposes areas of the public domain, and for the time being prevented those areas from being entered for private use.

Full power under the Constitution was vested in the executive branch of the government, and the extent to which that power may be exercised is governed wholly by the discretion of the Executive, unless any specific act has been *prohibited* either by the Constitution or by legislation."

Report of Secretary of Interior
(1908), p. 10.

This is a very remarkable utterance. No authority can be found in support of the proposition that *full power* under *the Constitution* was vested in the executive branch of the government as to these lands, and the theory that the executive may act concerning them at his discretion, *unless prohibited* by the Constitution or by legislation, is a unique doctrine in American history. The appellant is now driven, however, to adopt the same doctrine, although stating it less baldly.

Appellant's Brief, pp. 67, 95.

It was as the immediate successor to the administration which proclaimed such doctrines that President Taft became chief executive, and under him the

withdrawal of September 27, 1909, was attempted to be made. President Taft himself says:

"When President Roosevelt became fully advised of the necessity for the change in our disposition of public lands, especially those containing coal, oil, gas, phosphates, or water power sites, he began the exercise of the power of withdrawal by executive order, of lands subject by law to homestead and the other methods of entering for *agricultural lands*. The precedent he set in this matter was followed by the present administration."

Message, December 6, 1910, p. 92.

The withdrawal of September 27, 1909, made under the authority of President Taft, was a withdrawal from all entry under either mineral or non-mineral laws, and it seems that, after it was made, President Taft himself began to appreciate that such withdrawals of public lands from the operation of existing laws involved, perhaps, an assumption of executive power which was unauthorized, and on January 14, 1910, he sent a special message to Congress, which included the following paragraph:

"The power of the Secretary of Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statute would be detrimental to the public interests, *is not clear or satisfactory*. This power has been exercised in the interests of the public with the hope that Congress might affirm the action of the

Executive by laws adapted to the new conditions. Unfortunately Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to validate the withdrawals which have been made by the Secretary of the Interior and the President, and *to authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet the conditions of emergencies as they arise.*"

President's Special Message of January 14, 1910, p. 4.

We here see that President Taft was in doubt as to his authority to make the withdrawal of the previous September. His special message was sent to Congress for the purpose of inducing statutory action which would affirm and validate the withdrawals previously made, including that of September 27, 1909. As a result of this message we have the act of June 25, 1910, which act, however, as will appear upon examination of the same, and as will be developed later in this argument, did not affirm or confirm the action of the Executive as to past withdrawals, but did make provisions as to certain future withdrawals, but subject to the condition that nothing in the act contained should be deemed an *abridgment* of any rights, arising *after* such previous withdrawals made prior to the passage of that act itself.

These various quotations show the attitude of the executive branch of the government on the subject, and from them it is manifest that, in the opinion of some of our greatest Secretaries of the Interior, and of President Taft, who is one of our great lawyers, the lawful exercise of such executive power required the support of antecedent legislation by Congress.

3. *Judicial Decisions Are Adverse to the Independent Executive Power, Asserted by Appellant.*

When we come to consider the authoritative decisions of the courts upon the subjects, it becomes very clear that the Executive does not possess the power to withdraw public lands from the operative effect of existing laws, without the authority of some law of Congress which, by direct expression or by necessary implication, shall give such power of withdrawal.

The principal line of decisions upon this subject grows out of the various land grants made by Congress to railroad companies or to states for specific purposes, and where, in order to protect the grant, it was necessary, to some extent at least, to withdraw from public entry lands which were or might become the subjects of the grant.

It was at one time held that, where a grant was made to a railroad company of the odd-numbered sections for a certain distance on each side of the line of final location of the road, and within an additional distance from the line of the road there should be a grant of indemnity lands to make up for losses within the limits first specified, a withdrawal could be made

by the Secretary of the Interior, not only of the lands within the original granted limits, but also the lieu lands within the indemnity limits outside of the original place limits of the grant, until the opportunity should be had for selection by the grantee. These authorities are, in effect, overruled by subsequent decisions.

It is very manifest that, if the Secretary of the Interior under his general powers has the right to withdraw public lands from the operation of existing laws, and to do so at his discretion, then there could be no legal objection to the withdrawal of such indemnity lands; and especially as the withdrawal would, in its nature, be temporary, for it would terminate after the selection by the railroad company of the lieu lands to which it was entitled.

But this court has clearly held in divers cases that under these various land-grant acts the President or Secretary had no power to withdraw the indemnity lands pending the time when the statutory grantee should make selection.

In the case of *Hewitt vs. Schultz*, 180 U. S., 139, this court approved the action of Secretary Vilas in annulling an order of withdrawal as to lands within the indemnity limits on the grant made to the Northern Pacific Railroad Company. And this decision is followed by various decisions of the Supreme Court, expressing with more and more emphasis the fact that such withdrawal of indemnity lands was not authorized by law.

Thus this court says:

“But the real question is not whether the indemnity lands lay within or beyond the

forty-mile limit, but whether the withdrawal can operate upon indemnity lands at all. It makes no difference in principle whether the indemnity lands are within or beyond the forty-mile limit, which is not a limit of withdrawal but of survey, and the whole argument in *Hewitt vs. Schultz* is directed to the question whether it is within the power of a Secretary of the Interior to withdraw indemnity as well as place lands from settlement. * * * The power of the Secretary to withdraw lands is exercised for the purpose of carrying out the grant to the railroad, and to prevent lands covered by said grant from being taken up by settlers before the road is completed and the patents issued to the company; but clearly that power cannot be exercised to withdraw lands which are beyond the intended limits of the grant."

Southern Pacific R. R. Co. vs. Bell, 183
U. S., 675, 685-686.

If the President or the Secretary of the Interior can at his own discretion, and without specific statute authorizing the same, but under the general authority of the President or the Secretary, withdraw public lands from the operation of existing laws, then it is manifestly immaterial as to the moving cause which induces action by the executive officer.

In a recent case this court thus speaks of the authority of the Secretary :

"We cannot give to the withdrawal from sale, pre-emption or settlement of the lands

upon which Ard entered in 1866 the legal effect which the plaintiffs in error insist must be given to it. It is conceded that the lands were not within the place or granted limits of either railroad, but were within indemnity lands. * * * The withdrawal of them from sale, or settlement, simply at the request of Senators and Representatives from Kansas, prior to the definite location of the road and before they were regularly selected to supply deficiencies in place or granted limits, was without authority of law. Such unauthorized withdrawal did not stand in the way of Ard, in virtue of his settlement on them in 1866 under the then existing homestead laws, from acquiring such an interest in the lands as would be protected against their subsequent selection by the railroad company."

Brandon vs. Ard, 211 U. S., 11, 21.

The last case cited is particularly pertinent in its application to the case under consideration. Congress, by its act of March 3, 1863, had granted to Kansas certain lands. A few days after the act was passed an order of withdrawal was approved by the Secretary of the Interior, and was received at the local land office May 5, 1863. This withdrew all the lands within certain limits, including that afterwards located by Ard. In June, 1866, Ard made an attempted settlement on the land under the homestead laws; made substantial improvements, and in July, 1866, made a homestead application, which was rejected by reason of the withdrawal. The map of definite location was

filed December 6, 1866. On July 1, 1867, Ard, having still been in possession of the property and making improvements, made a further application for his homestead entry, and this was denied. In 1872 he made another application, and this was denied. Ard remained continuously, however, in possession. So we have here a case where the right of the private citizen was initiated *after* the order of withdrawal was made by the Secretary of the Interior. The order of withdrawal was held to be beyond the power of the Secretary, and, therefore, void, and Ard's rights, so initiated after withdrawal and before selection of lands under the congressional grant, were sustained.

In a case not involving indemnity lands, this court thus announces the general rule:

"Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by *Congressional authority* or by an executive withdrawal *under such authority*, either expressed or implied. *Wolsey v. Chapman*, 101 U. S. 755, 769; *Hewitt v. Schultz*, 180 U. S. 139. We must, therefore, refer to the action of Congress to discover whether lands which in fact were public lands of the United States were reserved from sale or other disposition under its public laws because they were included within the claimed limits but in fact were not within the actual

limits of a grant by the Spanish or Mexican authorities before the cession of the territory by Mexico to the United States by the treaty of Guadalupe Hidalgo of February 2, 1848."

Lockhart vs. Johnson, 181 U. S., 516,
520.

An interesting case bearing upon the powers of the Secretary as to the changing or suspending the operation of laws was determined by the Circuit Court of Appeals for the Eighth Circuit in a matter relating to allotment of lands to the Indians. The discussion is important in showing the powers of the Secretary. We quote as follows:

"Section 441, Revised Statutes (U. S. Comp. St. 1901, p. 252) : 'The Secretary of the Interior is charged with the supervision of public business relating to the following subjects * * * Third—The Indians.'

Section 463, Revised Statutes (U. S. Comp. St. 1901, p. 262) : 'The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.'

None of these provisions conferred the power claimed. It is not necessary to consider whether the provisions in the general allotment law quoted control allotments under the act of April 28, 1904. It is true, if this law applies, allotments must be 'made under

such rules and regulations as the Secretary of the Interior may from time to time prescribe.'

The power of Congress over the whole subject of our relations to the Indians is plenary. [Citing cases.] But it does not follow, because Congress makes a valid law and intrusts its execution to the head of an executive department, with power to make rules and regulations for its execution, that he is thereby clothed with plenary power to make such rules and regulations as would not aid in the execution of the law but nullify its provisions. In *Williamson v. United States*, 207 U. S. 462, the Supreme Court said:

'True it is that in the concluding portion of section 3 of the timber and stone act * * * it is provided that "effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office;" but this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations *destructive of rights which Congress had conferred.*'

Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment he could withdraw substantially all of them, if that

seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations.

The power to withdraw the land in question cannot be found in the provision that allotments should be certified to the Secretary of the Interior for his action, in the one providing for his approval of allotments before patent, in section 441, R. S., charging the Secretary of the Interior with supervision of the public business relating to the Indians, or in section 463, R. S., charging the Commissioner of Indian Affairs under the Secretary of the Interior with the management of Indian affairs and matters arising out of Indian relations. If under any of these laws the Secretary of the Interior could withdraw lands from allotment, or upon his judgment that lands authorized to be allotted by Congress ought not to be allotted refuse to approve an allotment when submitted for action, the very statute under which this action was brought, and which was enacted after all the statutes relied on were passed, would be practically nullified."

Leecy vs. United States, 190 Fed.,
289, 292-293; 111 C. C. A., 254.

In the case of *Nelson vs. Northern Pacific R. R. Co.*, a map of general route of the Northern Pacific Company having been filed, a withdrawal from sale or entry was made of all the odd-numbered sections falling within the limits designated by the map, and the order required that the price of the even sections in the same territory should be increased to \$2.50 per acre. This withdrawal order was made on November 1, 1873. Nelson's occupancy of the ground then in controversy commenced in the year 1881. He continuously resided upon the property, and made application for entry so soon as survey was made. The map of definite location of the company's line was not made until December 6, 1884. The withdrawal of 1873 was held invalid. This court said:

"The withdrawal merely from sale or entry in 1873, based only on a map of the general route of the road, did not identify any specific sections, was not expressly directed or required by the act of 1864, was made only out of abundant caution and in accordance with a practice in the Land Department, and *did not and could not affect any rights given to homestead occupants by Congress in the acts of 1864 and 1880.*"

Nelson vs. Northern Pacific R. R. Co.,
188 U. S., 108, 133.

In the case of *Sjoli vs. Dreschel*, this court, citing many authorities in a note, held:

"That the Secretary of the Interior has no authority to withdraw from sale or settle-

ment lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."

Sjoli vs. Dreschel, 199 U. S., 564, 566.

In the case of *Osborn vs. Froyseth*, a railroad company was the beneficiary under the act of July 4, 1866. On July 12, 1866, and again by a modified order of April 22, 1868, an order was made withdrawing from settlement, for the benefit of the grant, the lands included within the indemnity limits of the line of railroad as located. In May, 1883, the railroad company attempted to select the land in controversy, together with other lands within the indemnity limits. Its selection was not approved, because not made in accordance with the rules of the department. There was no final approval of the selection until 1901. In the meantime, on May 15, 1889, a settlement was made by the homesteader upon the land, for which he afterwards attempted to make entry, and entry was refused on the ground that the land had been withdrawn by the executive withdrawal of April 22, 1868. The court says:

"A rejection upon the ground stated was not authorized, for the Secretary of the Interior *had no authority to withdraw* from settlement lands within the indemnity limits of the grant which had not been before selected and approved by him."

Osborn vs. Froyseth, 216 U. S., 571, 574.

In another case, decided by the Circuit Court of Appeals for the Eighth Circuit, the court, speaking, through Judge Sanborn, of a withdrawal by the Secretary and of subsequent suspension of such withdrawal, said :

“But the Secretary’s original withdrawal and his subsequent suspension were alike futile. He was *without lawful authority* to make either, and the lands always remained open to entry and sale under the timber and stone act, the homestead, the pre-emption, and the other general laws for the disposition of the public lands until each particular tract was either sold thereunder or the Secretary approved its selection by the railway company.”

Hoyt vs. Weyerhaeuser, 161 Fed. Rep.,
324, 328; 88 C. C. A., 404.

The case last above cited was reversed by this court, but the reversal was not based on any objection to the legal proposition above quoted, but was based entirely upon the question as to whether the rights held under the railroad company would accrue only upon the *approval* by the Secretary of the Interior of the selections made by the railroad company, or would, by relation, take effect as of the date of *filing* the selections. It was held by the majority of the court that the doctrine of relation applied in that case, and that the rights of the claimant under the railway company would date as of the *filing* of the lists which were subsequently approved, and that, as the rights of the other party originated between the dates of filing and of ap-

proval of the lists of selections, the case was improperly decided by the Court of Appeals.

Weyerhaeuser vs. Hoyt, 219 U. S., 380,
386, 388.

It will be observed that in certain of the cases which we have already cited attention is called to a provision in certain of the railroad grants referred to—as, for example, in the Northern Pacific grant—that the pre-emption and homestead acts—

“shall be and the same are hereby extended to all other lands on the line of said road as surveyed excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than \$2.50 per acre when offered for sale.”

In none of the cases cited is the conclusion of the court as to invalidity of the withdrawal based solely upon this provision of the statute. It is, in some instances, used as a cumulative argument. But the main reliance in the discussion is upon the proposition that no special authority had been given to make the withdrawal, as expressed in a passage already quoted from Secretary Lamar (*supra*, p. 42) :

“Waiving all question as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands.”

That this court does not rely in these decisions upon any prohibitory effect contained in the words of the statute above quoted is manifest from various of the decisions above cited.

In the case of *Lockhart vs. Johnson, supra*, in which the court so strongly stated the proposition that lands are to be regarded legally open for entry and sale under the land laws, "unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal *under such authority*, either expressed or implied," the statutes under consideration did not involve a land grant, and were not affected by any such words as are above quoted from granting statutes.

In the case of *Southern Pacific Company vs. Bell, supra*, the language quoted from the act is not cited or relied upon, and yet the court, speaking of the power of the Secretary to withdraw lands, says:

"Clearly that power cannot be exercised to withdraw lands which are beyond the intended limits of a grant."

And in the case of *Brandon vs. Ard*, above cited, no argument is based upon such statutory words.

It seems to us apparent that the real object of these provisions in the railroad granting acts was simply to provide for the increased price per acre for agricultural lands within the railroad granted limits which should be thereafter taken under the pre-emption or homestead acts, and the provision is made in different ways in different statutes. For example, taking the case of *Brandon vs. Ard, supra*, the rights turned upon the act of March 3, 1863, making a grant

of lands to the State of Kansas to aid in the construction of certain railroads. Instead of using language "extending" the pre-emption and homestead laws to the land not granted, the statute simply provided:

"That the sections and parts of sections of land which, by such grant, shall remain to the United States, within ten miles on each side of said road and branches, shall not be sold for less than double the minimum price of the public lands when sold; * * * Provided, that actual and bona fide settlers, under the provisions of the pre-emption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same, at the increased minimum price aforesaid. And provided, also, that settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy, and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each."

12 Stat. L., 773.

It is clear that the purpose of these provisions was to double the minimum price of land under the pre-emption laws, and to give only one-half the amount of land which would otherwise go under the homestead laws, within the railroad grant limits; and, in any event, the decisions of the Supreme Court, as above urged, are broad enough to sustain our conten-

tion in full, notwithstanding any such words in the railroad granting acts. But how can the appellant find any comfort in these provisions when in the present case it seeks to avoid the equally clear provisions of existing laws *declaring all of the mineral domain open to exploration and purchase?*

The authorities we have cited in this discussion express the latest views of this court upon the question. And upon the general proposition as to whether, independent of any congressional authority, the President has any inherent or implied power to withdraw public lands from the operation of existing laws, the argument seems conclusive against the power, subject to such particular exceptions, if any, as are controlled by special principles applicable thereto.

4. *The Des Moines River Cases Do Not Militate Against the Contention of Appellees.*

Against the definite and well-considered decisions of this court above cited, the appellant cites a series of cases, known as the Des Moines River cases, all of which grow out of the same grant, the same withdrawal, and the same general state of facts, and which were decided many years ago.

When properly considered, the Des Moines River cases are not in conflict with the principles more recently laid down by this court in the authorities already cited. The facts out of which those cases grew are set forth at length in the earlier of the decisions, to-wit, *Dubuque & Pacific R. Co. vs. Litchfield*, 23 Howard, 66, and *Wolcott vs. Des Moines Co.*, 5 Wall., 681. The primary question was as to whether the

grant made to the State of Iowa by the act of August 8, 1846, of certain lands along the Des Moines River attached to lands above the mouth of Racoon Fork. If the terms of the grant did attach to these lands above the mouth of that fork, then such lands were necessarily withdrawn from private entry.

In the case of *Wolcott vs. Des Moines Co.*, in the passage quoted by the appellant (Appellant's Brief, p. 38), the court says:

"The grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. * * * That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

Wolcott vs. Des Moines Co., 5 Wall.,
681, 688-689.

As suggested in the quotation last made, there had been a great difference of opinion in the construction of this grant as to the extent of lands covered thereby. Justice Miller remarks in another case concerning it that—

"This question was the subject of opposing decisions by at least three Secretaries and

as many Attorneys General, and occupied several years of negotiation between the State and the Department. At one period of the controversy the lands were all certified to the State by the Secretary, Mr. Stuart."

Williams vs. Baker, 17 Wall., 144, 147.

The grant was made for the purpose of aiding the Territory of Iowa to improve the navigation of the Des Moines River from its mouth to Racoon Creek, and granting alternate sections of the public land for a strip five miles in width on each side of the river, with provision for selection subject to the approval of the Secretary of the Treasury (this was before the creation of the Department of the Interior). Whatever withdrawal was made, was made under the authority of the granting act and to preserve the grant, and not under any general power of the Secretary to withdraw lands at discretion. And in one of these cases the court directly says:

"The truth is, there can be no reservation of public lands from sale except by reason of some treaty, law, or *authorized act* of the Executive Department of the government."

Wolsey vs. Chapman, 101 U. S., 755,
769.

In the quotation made by appellant from the case of *Wolcott vs. Des Moines Co.*, 5 Wall., 688 (Appellant's Brief, p. 38), there are, indeed, words (italicized by appellant) which express an opinion in support of a broad executive authority, but they are not made in that case to control the decision. If these

words stood alone and unaffected by subsequent decisions of a contrary effect, they would have weight; but the court, as if in doubt as to the first proposition made, as to the power of the Secretaries, proceeds to derive a special power from the grant of 1846, and the necessary implications from that grant. And it is upon such necessary implications, or upon direct authority, that we find this power in the Secretary confirmed in any subsequent case.

In these Des Moines River cases the question as to the effect of the act granting lands for the improvement of the Des Moines River, and the effect of the reservation of lands to satisfy the grant, sometimes arose in determining the rights of private entrymen under the Pre-emption Act, and sometimes from rights claimed by the grantees of a railroad company under a subsequent granting act. And there were necessarily involved to some extent in the discussion certain expressions contained in these other acts.

The Pre-emption Act of September 4, 1841, provided:

"No lands included in any reservation, by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or for other purposes * * * shall be liable to entry under and by virtue of the provisions of this act."

5 U. S. Stat., 456.

The act of May 15, 1856, made a grant of lands to the State of Iowa of alternate sections to aid in

the construction of certain railroads in said state, but with a proviso as follows:

"That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or for any other purposes whatsoever, be and the same are hereby reserved to the United States from the operation of this act * * * ."

11 U. S. Stat., 10.

The grant which was the occasion of the great differences of opinion which arose among executive officers was dated August 8, 1846, and was entitled, "An Act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines River in said territory," and it granted to the Territory of Iowa, "for the purpose of aiding said territory to improve the navigation of the Des Moines River from its mouth to Racoon Fork (so-called) in said territory, one equal moiety in alternate sections of the public land (remaining unsold and not otherwise disposed of, unincumbered or appropriated) on a strip five miles in width on each side of said river."

9 U. S. Stat., 77.

The first Secretary who had occasion to consider the scope of the grant of 1846 was Mr. Walker, then Secretary of the Treasury, who expressed an opinion that the "grant extends on both sides of the river from

its source to its mouth, but not into lands on the river in the State of Missouri."

This court says concerning the view of Secretary Walker:

"This opinion conceded that 900,000 acres *above* the Racoon Fork was within the grant."

23 How., 85.

It was under this construction of the scope of the grant that the reservation for satisfaction of the grant was made, and such reservation was made directly pursuant to act of Congress; for, as we have already quoted from the case of *Wolcott vs. Des Moines Co.*, the court says that this grant carried along with it, by necessary implication, not only the power "but *the duty* of the land office to reserve from sale the lands embraced in the grant." It is a well-settled doctrine that if lands are once reserved from the public domain *by proper authority*, then the reservation continues in full force and effect until revoked by act of Congress, or by the executive authority that made the original reservation. Therefore, when the question arose in these various cases as to whether this reservation had been made by "competent authority," there was really but one answer to make. It was by authority necessarily implied from an act of Congress, as that act was construed by the officer whose duty it was to first construe it.

In one of these Des Moines River cases the statement of the case, after speaking of certain adjustments that were made, says:

"Soon after this adjustment, that is to say, in the spring of 1867, this court, in the case of *Wolcott v. Des Moines Company*, decided that the lands which had been reserved by the action of *so many principal officers of the United States*, including Mr. Stuart, Secretary of the Interior, had been reserved by 'competent authority,' within the meaning of the proviso of the act of May 15th, 1856, and decided again the same thing in *Des Moines Navigation Company v. Burr*, and yet again in *Harriet Riley v. W. B. Wells*."

Homestead Co. vs. Valley R. R., 17 Wall., 153, 159-160.

The appellant especially urges the case of *Bullard vs. Des Moines R. R.* (122 U. S., 167), as sustaining an executive power to withdraw public lands "in aid of proposed legislation."

The words "in aid of proposed legislation" do not appear in the decision, and we submit that there is nothing whatever in that case to support *such* "aid of proposed legislation" as is contemplated by the withdrawal order of September 27, 1909, involved in the case at bar. Let us, at the expense of some repetition, briefly review, chronologically, the history involved in the *Bullard* case:

August 8, 1846: Congress granted to the State of Iowa certain lands on each side of the Des Moines River. (9 U. S. Stat., 77.)

March 2, 1849: Secretary of the Treasury Walker construed the granting act as including lands above

the mouth of Racoon Fork to the source of the river. (23 How., 85.)

Under this construction, the act of Congress itself reserved the lands from private entry, and it was the *duty* of the Land Office to withdraw them from sale. (5 Wall., 688-689.) Some lands above the mouth of the fork were actually certified to the state, and by it sold to purchasers.

April 6, 1850: Secretary of the Interior Ewing ordered all the lands then in controversy withdrawn from market, "which order has been continued ever since, in order to give the state the opportunity of petitioning for an extension of the grant by Congress. This court has decided in a number of cases, in regard to these lands, that this withdrawal operated to exclude from sale, purchase, or pre-emption all the lands in controversy." (122 U. S., 170-171.)

In 1860 this court decided (23 How., 66) that the grant did not include lands above the mouth of the fork. Efforts were at once initiated in Congress to extend the grant so as to cover the lands so excluded by this court. In the meantime "the Des Moines Navigation Company, under contract with the state, had spent large sums of money beyond what they had received from the state, and beyond the value of the lands certified to the state by the Secretary. The work, with all the materials and implements on hand, was suspended, and the danger of the works being swept away and ruined by floods in the river was imminent. *The whole subject was before Congress*, but, without waiting to dispose of it entirely, that body, by way of immediate relief," passed the joint resolution hereinafter mentioned. (122 U. S., 171.)

May 18, 1860: The Commissioner of the General Land Office gave notice that the lands theretofore reserved would continue reserved, "to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the state, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper." (122 U. S., 173.)

March 2, 1861: The joint resolution of Congress above referred to was passed, relinquishing to the State of Iowa land theretofore improperly certified to the state "which is now held by *bona fide* purchasers under the State of Iowa." (122 U. S., 172.)

May 2, 1862: Two of the settlements on which Bullard's claim was based were initiated on lands included in the reservation. Bullard's title was not based upon any right in the State of Iowa, but was in opposition to that right. (122 U. S., 174, 175-176.)

July 6, 1862: Congress, by statute, extended the grant made to the State of Iowa so as to include the lands to the north boundary of the state, including all the lands which Secretary Walker in 1849 held to be covered by the original grant.

The remaining settlement claimed by Bullard was made after the last granting act of July 6, 1862.

There was no contention in the Bullard case that the original reservation and continuance of the same were not valid. The question raised, and the one decided by the court, was simply whether the joint resolution of March 2, 1861, *restored* the reserved lands to the public domain. That resolution did not purport to restore any lands to the public domain, and,

as this court says, dealt only with a part of the subject. The principle applies to this case, as in the other cases of the same series, that the granting act, as originally construed by the Secretary who had first to construe it, necessitated a withdrawal of all these lands. They were withdrawn, and that withdrawal would be effective until revoked, as above suggested, by act of Congress, or by the executive. Instead of revoking it, the reservation from the public domain was made absolute by the act of Congress of July 12, 1862, which granted all the lands in controversy to the state.

Under the circumstances affecting these Des Moines River cases, as hereinabove set forth, we respectfully insist that these cases do not in any degree militate against the proposition we are urging, to the effect that the President or Secretary of the Interior has no inherent or implied power to reserve from the operation of existing laws large tracts of the public domain, when there is no statute which either expressly or by implication gives him that power.

In all of the decisions of this court bearing upon this subject, where the power of the President or Secretary to make a general withdrawal of lands was sustained, it will be found that there was some statute which either expressly, or by necessary implication, authorized and required a withdrawal in order to protect the grant that was made, or to accomplish the specific purpose contemplated by the statute.

We readily concede the principle that where a grant of lands is made by Congress it is the duty of the land department to withdraw the lands granted from the operation of the general land laws, as this

would be necessary to preserve the rights that Congress intended to convey. Even the earlier decisions which sustained a power in the Secretary to withdraw indemnity lands prior to selection rested on the doctrine that the granting acts implied this power as necessary to carry out the will of Congress as expressed in the statutory grant. It was but another way of saying that the executive duty "to take care that the laws be faithfully executed" required such withdrawal in order to effectuate the congressional grant. But this court now clearly holds that this power of withdrawal is always limited to what was intended by Congress as the scope of the immediate grant. This is shown very clearly in that line of decisions we have already cited, which, while holding that it is within the power of the Secretary of the Interior, and is his duty, to withdraw lands in the place limits of railroad grants from any entry or sale under the public-land laws, yet further declare that when the Secretaries go outside of those limits and withdraw lands to which the grant had not yet applied, such withdrawal is beyond the power of the Secretaries, because it is beyond the scope of the granting act. This principle runs through all of the recent decisions of this court. Nowhere do we find recognized an "inherent power" on the part of the President or Secretary to withdraw lands at his discretion or in accordance with his will.

Our answer, therefore, to the question propounded at the head of this division of our argument would be: That the source and sanction for any authority of the President or Secretary of the Interior to withdraw public lands from *non-mineral* entry under existing

laws must be found in congressional legislation, and the extent to which the executive authority is granted must be measured by the words of the congressional enactment.

V.

Under what sanction and to what extent has the President the power to reserve public lands for public uses?

The appellant presents the contention that the authority of the President to make the withdrawal of lands now under consideration is sustained by the fact that he has the power to make reservations for military purposes and for Indian reservations.

It will be borne in mind that Temporary Petroleum Withdrawal No. 5 does not purport to make any reservation or appropriation for any purpose whatsoever. It is simply a withdrawal of all the mineral-oil domain from the operation of existing laws, with a view to a change of those laws.

Even if it be true that the President has power, not founded on statute, to actually appropriate and take possession of particular tracts of land for specific public uses, this surely is no argument in support of a power to withdraw from the operation of existing laws the entire mineral-oil domain by an order which makes no appropriation for any purpose, takes no possession of any land, and devotes no land to a public use.

We shall, however, proceed to consider this contention of the appellant, and ascertain the source and the extent of the alleged power of the President even in these particulars, although to us they do not seem

relevant to the present controversy. We shall find that these powers alleged to exist in the President were originally, and have been generally, derived from action of Congress; and that their later exercise without specific act of Congress to authorize the same has been based on an assumed grant by Congress, pursuant to a general policy manifested by numerous acts giving discretion to the President in cases of like character.

An early and an interesting case bearing upon the subject was decided in this court as long ago as 1839. In the case of *Wilcox vs. Jackson* (13 Pet., 496) this court reversed a decision of the Supreme Court of Illinois, but in order that we may properly understand the principles involved, so far as they affect the question now in controversy, it is well for us to know what was decided by the Supreme Court of Illinois.

In the case of *McConnell vs. Wilcox* (1 Scam., 344), the court had said:

"We take it for granted that there can be neither a reservation nor appropriation of the public domain for any purpose whatever without the express authority of the law. It can not, surely, be seriously contended that the President of the United States, or any of the executive officers in the several departments of the government, possess an absolute and inherent power to do any official act not authorized by the Constitution or laws of the United States. To the Constitution and laws they must alone look for the source of their power and authority because they can derive them from no other. The government itself is

a limited one, and the great charter under which it exists, has prescribed bounds which can not be rightfully transcended; and all its functionaries are necessarily restrained by its provisions and the laws made in pursuance thereof from the exercise of an authority not granted thereby. If it be considered that the President may reserve or appropriate the public domain to any purpose he may in his judgment deem useful to the country, without warrant or authority of law, why may he not, in like manner, appropriate the public treasure for similar objects? The one may be as laudable as the other, but both would be equally unauthorized and illegal. To admit for a moment that the President, without the authority of law, may direct the application of the public moneys of the nation, to even such objects as may undeniably be salutary and highly useful, would be to admit the exercise of a power in direct violation of the Constitution; and yet the exercise of a power appropriating and applying the public lands to purposes not authorized by law, but in direct violation of the express condition on which they were ceded, and the purposes to which they were solemnly stipulated to be applied, it is contended, is an implied power, rightfully exercised by an inferior officer of the government without the assent of the executive of the nation. This position is most assuredly untenable. Neither the officer, acting in his own name or that of the Presi-

dent, nor the President himself, possess any such authority" (p. 354).

Now, while the decision in this case was reversed by this court, yet there was no criticism upon or dissent from the principles so clearly announced in the opinion of the state court. The difference arose in the construction of the statutes under which the President had acted. This court, after referring to the act of May 29, 1830, under which McConnell was claiming, which provided "that no entry or sale of any land shall be made under the provisions of the act, which shall have been reserved for the use of the United States, or either of the several states, or which is reserved from sale by act of Congress, or *by order of the President*, or which *may have been appropriated for any purpose whatsoever*," then goes on to say :

"Now, that the land in question has been appropriated, in point of fact, there can be no doubt, for the case agreed states that it has been used from the year 1804, until and after the institution of this suit, as well for the purpose of a military post, as for that of an Indian agency, with some occasional interruption. Now, this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use. But it is said that this appropriation must be made by authority of law. *We think that the appropriation in this case, was made by authority of law.* As far back as the year 1798, see act of May 3d of that year (1 U. S. Stat. 554), an appropriation was made for the purpose,

amongst other things, of enabling the president of the United States to erect fortifications in such place or places as the public safety should, in his opinion require. By the act of 21st of April, 1806 (2 Ibid. 402), the president was authorized to establish trading houses at such posts and places, on the frontiers, or in the Indian country, on either or both sides of the Mississippi river, as he should judge most convenient for carrying on trade with the Indians. And by act of June 14th, 1809, he was authorized to erect such fortifications as might, in his opinion, be necessary for the protection of the northern and western frontiers. We thus see, that the establishing trading houses with the Indian tribes, and the erection of fortifications in the west, are *purposes authorized by law*; and that they were to be established and erected by the president. But the place in question is one at which a trading house has been established, and a fortification or military post erected. It would not be doubted, we suppose, by any one, that if congress had by law directed the trading house to be established and the military post erected, at Fort Dearborn, by name; that this would have been by authority of law. But instead of designating the place themselves, they left it to the discretion of the president, which is precisely the same thing in effect. *Here then is an appropriation, not only for one but for two purposes, of the same place, by authority of law.*

But there has been a third appropriation in this case, *by authority of law*. Congress, by law, authorized the erection of a lighthouse at the mouth of Chicago river, which is within the limits of the land in question, and appropriated \$5,000 for its erection; and the case agreed states, that the lighthouse was built on part of the land in dispute, before the 1st of May, 1834. We think, then, that there has been an appropriation, not only in fact *but in law*."

Wilcox vs. Jackson, 13 Pet., 496, 511-512.

This case involved an actual appropriation of lands for military purposes, and yet even in such a case this court does not suggest or countenance any power in the President, independent of statute, to make such appropriation, but takes special pains to show that his power rested on antecedent legislation. Congress, exercising its constitutional power, has, in numerous cases, conferred upon the President *discretion* in the matter of selection or appropriation of public lands for public uses. It has by statute in recent years on several occasions given a discretionary power to the President to make extensive reservations of lands, withdrawing them from the right of private entry. *After* the passage of such statutes, and within their intended scope, the power *is* conferred upon the President, and he legitimately exercises that discretion which has been given him by *Congress*, which has the exclusive control of the public lands.

The case principally relied upon by appellant, and frequently cited by those who support the authority

of the President to make appropriations of public lands for public uses without antecedent authority from Congress, is the case of *Grisar vs. McDowell* (6 Wall., 363), decided by this court in 1867. In that case the court says:

"From an early period in the history of the government it has been the *practice* of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for *public uses*."

The decision itself is not a very satisfactory authority, for the simple reason that the remarks made in the opinion upon this matter were not necessary to the decision of the case then before the court. They are *obiter*, for in the first part of the very paragraph in which we find the above quotation the court says:

"On the other hand, if the lands were at the time a part of the public domain, as they must be considered to be, because they have been excluded from the lands confirmed to the city in satisfaction of the claim, *it is of no consequence to the plaintiff* whether or not the President possessed *sufficient authority to make* the reservations in question. It is enough that the title had not passed to the plaintiff, but remained in the United States" (p. 380).

After making the statement first above quoted, and elaborating it by reference to certain statutes hereinafter noted, the court says:

"The action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them" (p. 381).

If, however, the above dictum should be accepted as declaring the law as applied to the facts of that case, it is to be noted that the opinion related to a military reservation at San Francisco which had been long occupied by the government for military purposes, and was, at the time the controversy arose, in the possession of the government and used for military purposes.

It is in such a connection that the opinion in that case recognizes the authority of the President, as the "exigencies of the public service" required, to reserve certain parcels of land belonging to the United States, and setting them apart for *public uses*. It may be fairly contended that exigencies might arise in the public service which would justify the President in setting apart specific small tracts of land for an immediate public use, but such reservations must be by reason of some exigency, be limited in extent, and specifically designated and "marked out."

U. S. vs. Tichenor, 12 Fed., 415, 423.

An examination of congressional legislation, however, shows (as will hereafter more fully appear) that Congress has pursued the practice of giving to the President in advance the necessary authority to so reserve land for public uses, although generally leav-

ing to his discretion the place where such reservation shall be made, and often the extent of the reservation, although invariably defining the purposes.

The language quoted from *Grisar vs. McDowell*, has been made the basis of various decisions by courts and Attorneys General.

So, in a Florida case often cited on this subject, the language of the court is:

"It is well settled that the President of the United States, by executive order, could reserve a part of the public domain for a *specific lawful purpose* such as a *military reservation*."

That decision had reference to such an executive order made on February 9, 1842, directing a reservation for military purposes of two fractional sections and certain lots in another fractional section in Florida.

Florida Town Imp. Co. vs. Bigalsky, 44 Fla., 771; 33 So. Rep., 450, 451.

In an opinion of Attorney General MacVeagh, rendered in 1881, the authority of the President to set apart a *military reservation* on the Rio de la Plata, in Colorado, was sustained on the authority of *Grisar vs. McDowell*. In the course of his argument he says:

"It should be borne in mind that the power of the President here referred to is recognized by Congress. Such recognition is *equivalent to a grant*. Hence, in reserving and setting apart a particular piece of land

for a *special public use*, the President must be regarded as acting by authority of Congress."

17 Opinions of Attorneys General, 160, 163.

The very next year Attorney General Brewster had occasion to consider the presidential power to make Indian reservations, and the question which specially concerned him was whether the reservation for Indians was a reservation for a *public use*. In the course of his opinion, after citing certain authorities, he says:

"In the cases cited the reservation had been for military purposes or for public improvements. Is a reservation for occupation by Indians a reservation for a public use?"

He then proceeds to argue that such a reservation is for a public use.

17 Opinions of Attorneys General, 258, 260.

The opinion of Assistant Attorney General (now Justice) Van Devanter, in reference to public lands in the Hawaiian Islands (29 L. D. 32), is based on the same principles and sustained by like authorities. He concludes that the President has power to reserve lands for *military* purposes, and urges that "*Congress recognized that some lands in Hawaii would be reserved for military and other public purposes.*" (P. 34.)

These views as to what constitutes public uses explain also decisions of certain courts in reference to

Indian reservations in cases which are also frequently cited in opposition to our contention.

See :

U. S. vs. Payne, 8 Fed. Rep., 883, 888.

Gibson vs. Anderson, 131 Fed. Rep., 39, 41.

In cases referring to Indian reservations it will usually be found that before the controversy arose in the courts there had, in addition to a previous statutory authority, been also a congressional recognition and appropriation in aid of the reservation. Thus, in the case last cited, it is said :

"The power of the President to create a reservation of public lands for the use and benefit of the Indians and for other purposes has been recognized both by Congress and by the courts—by Congress in enacting subsequent appropriation acts, appropriating money therefor, or other acts, as *in this particular case* by the act of May 27, 1902, and by the joint resolution No. 24 (32 Stat. pt. 1, 245-277), and joint resolutions Nos. 25 and 31 (32 Stat. pt. 1, 742, 744)."

131 Fed., p. 41.

We readily concede that if a withdrawal of specific lands was made by the President without previous authority of Congress—as, for example, for an Indian reservation, or for any other public purpose—and, *before any adverse rights arose*, there was a recognition of the withdrawal by Congress, appropriations made in aid of it, or other affirmative act to show that Congress understood and recognized the

propriety of the withdrawal, then from the date of such recognition and approval the withdrawal would be effective as against any private rights claimed to subsequently accrue. But the question becomes one of legal cognizance for the consideration of courts when private rights have accrued and become vested between the time of the withdrawal and the time of the recognition or approval by Congress. And the fact that such withdrawals, made without precedent authority, have passed unchallenged is, we respectfully submit, no argument for an executive power to make such withdrawals, and make them effective to defeat rights that shall arise under existing statutes prior to congressional approval of the withdrawal. We again call attention to the case of *Nelson vs. Northern Pacific Railroad Co.*, 188 U. S., 108, 133 (*supra*, p. 56), where the court, speaking of the withdrawal there referred to, said that it "was made only out of abundant caution and in accordance with a practice in the land department, *and did not and could not affect* any rights given to homestead occupants by congress in the Acts of 1864 and 1880."

Public uses of the United States, as used in *Grisar vs. McDowell* and the other decisions cited, must, however, refer to governmental use—a use rendered necessary for the proper discharge of the functions committed to the executive branch of the government in its various departments. It certainly does not apply to any broad exercise of power, independent of an immediately intended governmental use. In this connection see the following citations:

Covington vs. Kentucky, 173 U. S., 231,
242.

Williams vs. Lash, 8 Gilfillan (Minn.), 496.

Orr vs. Quimby, 54 N. H., 590.

The appellant cites the case of *Scott vs. Carew*. (Appellant's Brief, p. 26.) The question in that case was whether Hackley could claim the benefit of the Settlement Act of 1826, and the court says:

"Prior to that act he was wrongfully in possession of the tract, and could have been summarily removed by order of the President. (Act of March 3, 1807). His dispossession was by authority of law. It was done in the exercise of the power vested in the President as Commander-in-Chief of the Army, the order of the War Department being presumed to be that of the President."

Scott vs. Carew, 196 U. S., 100, 109.

Now, the act of March 3, 1807, here referred to, was an act to prevent settlement being made on lands ceded to the United States until authorized by law. And it contained this clause:

"And it shall moreover be lawful for the President of the United States to direct the Marshal or officer acting as Marshal, in the manner hereinafter directed, and also to take such other measures and to employ such military force as he may judge necessary and proper to remove from lands ceded or secured to the United States by treaty or cession, as aforesaid, any person or persons who shall hereafter take possession of the same, or

make or attempt to make a settlement thereon until thereunto authorized by law."

2 U. S. Stat., 445.

The passage quoted by the appellant, therefore, had absolutely nothing to do with the validity of the reservation, as affecting subsequent rights acquired under the settlement laws. But this court does say that the occupation of the tract by the United States troops was rightful, and announces a rule as to the settler's rights, as follows:

"A more substantial reason is to be found in the rule that whenever a statute is passed containing a general provision for the disposal of public lands, it is, unless an intent to the contrary is clearly manifest by its terms, to be held inapplicable to lands which for some *special public purpose* have been in accordance with law taken full possession of by and are in the *actual occupation* of the government."

Scott vs. Carew, *supra*, 109.

The rule so announced is very far removed from that for which the appellant contends in this case, and cannot in the slightest degree sustain a withdrawal of the entire mineral-oil domain of the United States from the operation of existing laws.

Appellant's citations relating to Indian reservations are not persuasive as supporting an implied power in the President even to set apart such reservations independent of congressional authority.

In the case of *United States vs. Leathers* (6 Sawyer, 17) the court makes the argument which we have already suggested, derived from subsequent recognition by acts of Congress and by appropriation of moneys. It also relies on section 462 of the Revised Statutes, showing the powers of the Commissioner of Indian Affairs, and section 465, relating to the powers of the President as to Indian affairs, and on particular acts of Congress giving the President authority to set apart military reservations, and adds:

"But were this not so, the repeated recognition by Congress of the reservations established in Nevada by the President would be enough, along with the general powers given the President in Indian affairs, to show his authority."

26 Federal Cases, 898, 899.

The case of *United States vs. Payne* (8 Fed. Rep., 883) involved the construction of treaties and the powers of the President under the act of Congress of May 28, 1830, hereinafter cited, and even in the quotation in that case made by the appellant the power attributed to the President is to "reserve a part of the public domain for a *specific lawful purpose*."

In the case of *Gibson vs. Anderson* (131 Fed. Rep., 39), as already suggested, there had been subsequent recognition of the reservation by acts of Congress. In that case the Indian Reservation had been in existence for eleven years before Gibson attempted to initiate rights, and he did so then only in the erroneous belief that Congress had opened the reservation to mining locations.

In the case of *United States vs. Martin* (14 Fed. Rep., 817) again a treaty was involved, and, speaking of the treaty, the court says:

“Nothing has since been done to modify it, or to limit its operation. The reservation has been exclusively occupied by the Indians, under the treaty, ever since they first went upon it, and Congress has continually recognized it by annual appropriations, in pursuance of the treaty stipulations, for its support and the maintenance of an agent for the Indians thereon” (p. 822).

In *McFadden vs. Mountain View M. & M. Co.* (97 Fed., 670) the court says that the effect of the executive order was the same as would have been a treaty with the Indians for the same purpose, and then proceeds to say that Congress had passed an act authorizing the President to appoint a commission to visit the reservation and negotiate with the Indians for the cession of portions thereof. An agreement was made and an act of Congress was passed to ratify the agreement, and the main question upon which the case turned was as to whether the act of Congress, by itself, restored a portion of the reservation to the mass of public lands, or whether a new proclamation of the President was necessary before that result would be accomplished.

In the case of *United States vs. Grand Rapids & I. R. Co.* (154 Fed. Rep., 131) there was involved the question of the right of a railroad company, under its grant, to lands which had been in an Indian reservation. The railroad grant contained the usual provision excepting—

"any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purposes whatsoever."

A treaty was being negotiated with the Indians, and the court expressly states as follows:

"The reservation of the lands in question by the President *for the purposes of the contemplated treaty* was by 'competent authority' " (p. 135).

In the case of *In re Wilson* (140 U. S., 575) the court was speaking of the White Mountain Indian Reservation, which it says was a legally constituted Indian reservation. It was created, in the first instance by order of the President in 1871, and this court uses the following language:

"Whatever doubts there might have been, if any, as to the validity of such executive order, are put at rest by the act of Congress of February 8, 1887 * * * , the first clause of which is 'That in all cases where any tribe or band of Indians has been or shall hereafter be, located upon any reservation created for their use, either by treaty stipulations or by virtue of an act of Congress *or executive order* setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part there-

of, of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon, in quantities, as follows." "

The court then adds:

"The necessary effect of this *legislative* recognition was to *confirm* the executive order, and establish beyond challenge the Indian title to this reservation" (pp. 576-577).

The case of *Spalding vs. Chandler* (160 U. S., 394) also involved a treaty, and the court says:

"But whether the Indians simply continued to encamp where they had been accustomed to prior to the making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States government, or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. The clear *duty* rested upon the government to see that a tract was reserved for the purposes designated in the treaty" (pp. 403-404).

We respectfully submit that none of these cases are valuable as authorities in support of the government in its contention in the present case. In all the

cases cited by appellant on this subject there have been actual, direct reservations and appropriations of specific lands for recognized and legitimate *public purposes*. Any withdrawal of such lands from the right of private entry was merely incident to such actual appropriation. When private rights were thereafter asserted as to such lands, they came into collision with an operating and existing public use. In the case of *Gibson vs. Anderson* (131 Fed., 39), for example, Gibson made his mining location on lands which for eleven years preceding had been within the Spokane Indian Reservation.

There is a vast difference, not only in degree, but in character, between a reservation and appropriation of specific lands for recognized public uses, and a withdrawal of the entire mineral-oil domain from the operation of existing laws, in the hope that those laws will be changed.

Even as to such appropriations or reservations of lands for public uses the action of the President has in general been based upon specific authority granted by Congress, although often in the form of vesting in the President a discretionary power to make his own selection of lands for the public uses designated. This is illustrated by citations already made from *Wilcox vs. Jackson, supra*.

An examination of the statutes of the United States shows numerous enactments by Congress giving either specific or discretionary power to the President for the making of such reservations and appropriations for public use. We append to this brief, as an appendix (*post*, p. 161), a partial list of statutes of this character. Their number is significant, and these

frequent enactments show the real policy which has actuated Congress in relation to the use of public lands for public purposes.

The appellant, however, makes an argument based upon an alleged long continuance of a *practice* of the executive department to make reservations of public lands for public uses, without the authority of a specific antecedent statute, and upon the alleged congressional recognition of executive acts of this character.

It may well be conceded that there have been instances of such executive appropriations of lands unauthorized by previous statute specifically covering the subject-matter, and it may well be conceded that Congress has often allowed such acts to pass unchallenged, and has in effect ratified the executive act by subsequent legislation in aid of the object. But this is no argument, as it seems to us, that can control the courts when adverse rights have arisen, and the validity of the proceeding, as affecting such adverse rights, is the subject of judicial inquiry. The mere acquiescence of Congress in an unauthorized act of the executive is no congressional authority for a continuance or repetition of unauthorized acts. Congress does not stand over the Executive as a school-master with a rod to correct departures from an established rule. Generally speaking, the majority of Congress is politically in sympathy with the President, and there is no incentive or occasion for captious criticism where adverse rights are not affected; and, when adverse rights are affected, the question which arises is one for judicial and not legislative cognizance.

Counsel for appellant cite opinions of Attorneys General and of officers of the Interior Department in support of the executive power to reserve parcels of land for specific public purposes. The argument almost invariably finds its origin and main support in the case of *Grisar vs. McDowell* (6 Wall., 363), already discussed. In that case Mr. Justice Field said: "From an early period in the history of the government it has been the *practice* of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set aside for public uses." This court does not attempt to trace the origin of the "practice" or the sanction for it. It merely states the bald fact. But had Justice Field investigated the source and sanction for this "practice," he would have found them in the numerous statutes which we cite in the appendix to this brief, by which Congress had vested in the Executive a discretion to select, at such places as he should determine, and in such quantity as he should determine, particular parcels of land for specific public uses, when the exigencies of the public service so required. The practice referred to was simply the exercise of that discretionary power which had by these numerous statutes been vested in the Executive.

The opinions of Attorneys General are not conclusive upon anyone. They are advisory only, even as to heads of departments. (See *Dubuque & Pacific R. R. Co. vs. Litchfield*, 23 How., 85; see also *No. Pac. Ry. Co. vs. Miller*, 7 L. D., 100, 117.) We can well understand how officers connected with the executive branch of the government would naturally give opin-

ions sustaining the executive authority in cases coming within the language used by Justice Field in *Grisar vs. McDowell*, and yet we submit that the Attorneys General do not sustain the executive power in these cases upon any theory of "implied" power existing independent of congressional authority; but, rather, when the subject is interpreted in the light of the decision in *Grisar vs. McDowell*, they seem to assume that, discretion having so frequently by numerous statutes been vested in the executive to set apart parcels of land for specific public uses, it was to be inferred that this was a general policy of Congress, and that such discretion could be exercised in *any like case*, even though Congress had not enacted a specific statute covering the particular case.

This is illustrated by the opinion of Attorney General MacVeagh on July 15, 1881 (17 Opinions of Attorneys General, p. 163), cited by appellant, where the Attorney General says:

"It should be borne in mind that the power of the President here referred to is recognized by Congress (*Grisar v. McDowell, supra*). Such recognition is equivalent to a grant, hence in reserving and setting apart a particular piece of land for a special public use the President must be regarded as acting *by authority of Congress*."

This is an entirely different argument from that now presented by the appellant in this cause. The Attorney General finds the power of the executive to be a grant from Congress, and that, in making the reservations, he is acting by authority of Congress.

If this argument be sound, however, it is necessarily confined to the particular class of cases to which the argument is addressed, being the class of cases mentioned in *Grisar vs. McDowell*—cases where *parcels* of land are reserved and set apart for *public uses*, as the *exigencies* of the public service require. Whatever may be the merits of this argument on behalf of the executive power, it rests upon the assumption that *Congress* has in fact given the authority to the President to appropriate and use the public lands for military reservations and for Indian reservations, and, as the exigencies of the public service require, to take possession of and occupy parcels of land for specific public uses.

Appellant's counsel are not entirely happy in their selection of illustrations of executive acts (as unsupported by statute) setting apart land for public purposes, as cited at page 48 of their brief.

The first instance given is an order of President Buchanan, dated April 6, 1859, in reference to certain property to be used for military purposes in Utah. In the appendix to this brief (*post*, p. 166) we cite an act approved March 6, 1853 (10 Stat., 238), where the President was given discretion to set apart military reservations in Utah and New Mexico. The wide discretion given by this act would well have supported the act of the President only six years later in making the particular order to which counsel calls attention.

The order of President Johnson, made in 1867, for a reservation for military uses of a tract of land at Fort Wadsworth, in Dakota Territory, seems also to be sustained by precedent statute. Dakota Territory was formerly a part of Nebraska Territory. It

was a part of Nebraska in 1855, and authority was given by the act of February 17, 1855, for the *establishment* of military posts in the Territory of Nebraska at such points as the Secretary of War might designate. An authority having been given for the establishment for these posts, it became a continuing authority, because, once being established, they must be maintained. This statute we also cite in the appendix to this brief.

The reservation made for use of Fort Robinson in Nebraska, and Forts Sanders and D. A. Russell, etc., in Wyoming, would seem to be fully covered by the same statute; for at the time the act was passed all of these points were in the Territory of Nebraska, which extended west to the summit of the Rocky Mountains, and covered all the present territory of Wyoming east of the Rocky Mountains, as well as territory north thereof, and the later Dakotas.

Appellant next mentions an order of the Secretary of the Treasury, made at the request of the Secretary of War, on September 1, 1837, in reference to certain lands at Sturgeon Bay, Wisconsin. Now, on the eastern side of the present State of Wisconsin there is a long, narrow peninsula extending into Lake Michigan. The water between that peninsula and the mainland is known as Green Bay, which is at the mouth of Fox River and carries the water of that stream into the lake. On the east side of Green Bay, and on the west side of the narrow peninsula referred to, is Sturgeon Bay. All of this was formerly in the Territory of Michigan. (Act of April 18, 1818; 3 Stat., 431.) In 1834 certain land districts were created in that vicinity, and one of them

was known as "the Green Bay land district of the Territory of Michigan;" and in the act creating this land district provision was made for the sale of lands with certain exceptions, and included in such exceptions "such reservations *as the President shall deem necessary* to retain for military purposes, any law of Congress heretofore existing to the contrary notwithstanding." (Act of June 26, 1834; 4 Stat., 687.)

It is apparent that this reservation was for a stone quarry to be used in connection with certain public works then in progress, which public works must also have been authorized by law, and counsel put in quotation marks the words involved in the reservation; to-wit, "to be reserved from sale *according to law.*" These are not words that would be used as to a reservation not authorized by statute. The words "according to law" can only mean in accordance with some authority that had been given by Congress for the very thing that was then being done. Such words are not used as based upon an *implied* authority in the President or other executive officer.

The reservation made by President Hayes for reservoir purposes was in a matter initiated by Congress and not by the Executive, and was manifestly to protect a purpose contemplated by Congress, as shown by its *previous* appropriation for the necessary preliminary surveys and examination, and reports, which preliminary action was immediately followed by the actual construction of reservoirs upon the land mentioned.

In the vast multitude of authorizing acts vesting discretion in the President to reserve lands for specific public purposes it may not always be practicable to

trace, even though it actually exists, the preceding authority given by Congress. Such authorities were often contained in long appropriation acts, and while the appropriation might have been temporary, the authority given was to establish military posts or various reservations, or reserve lands for specified public uses; which authority was, in its nature, a continuing authority.

In the case *Donnelly vs. United States* (228 U. S., 243), this court had occasion quite recently to discuss one of the statutes cited in the appendix to this brief, being an act in relation to the Indians in California (13 Stat., 40), and the court, speaking through Mr. Justice Pitney, says:

"The terms of this enactment show that Congress intended to confer a discretionary power, and from an early period *Congress has customarily accorded to the Executive* a large discretion about setting apart and reserving portions of the public domain in aid of *particular public purposes*." (Citing authorities.)

The considerations here presented acquire increased significance when we consider the vast scope of these oil-land withdrawals. The appellant contends that the extent of area withdrawn is a matter which rests entirely with the President. But suppose, as in this case, that Congress has granted no power of withdrawal and, in the meanwhile, private rights have accrued under existing laws, is there no limit on action that is purely executive? Surely, in a country ruled by laws the answer is plain. Even if

it be admitted that, for some definite public use, recognized by law, the President has the power to reserve specific lands, it does not follow that he has the power to reserve *all* lands, including millions of acres of the same class, and involving vast areas manifestly not required for the public use designated. When the question is asked as to who shall decide such a question, we should say that when adverse rights have arisen it is clearly a question for the courts to decide, and it is not a matter which can be left to executive discretion.

The contention of appellant, relating to the scope of these oil withdrawals, may lead us into remarkable consequences. The contention is that the government *may* need (after a change of legislative policy) *some* land as a reserve for fuel oil for the navy. Therefore, the President may take out from the operation of existing laws *all* lands containing fuel oil. But the government is also a great user of gold. Gold is itself money; can be at once converted into coin, and, as coin, may be used to satisfy all the public needs. It has been and is the policy of many governments, for this reason, to hold title to lands containing the "royal metals" (gold and silver), and either operate the mines themselves or lease them upon royalties. That has not been the policy of the United States. But, under appellant's argument, does this fact stand in the way of executive action? The President thinks the law should be changed; that the policies pursued in foreign countries should also be pursued here; that the government should reserve its gold-producing lands for the benefit of the government, and especially for the production of such gold as it itself desires to

convert into coin. Therefore, the President, in the hope and expectation of a change of law, and of a change in the policy of a century past, withdraws from the public domain lands supposed to contain gold deposits. If he can withdraw some, under appellant's contention he can withdraw all, and thereupon, all lands bearing gold being withdrawn, the mining laws cease to be operative. Again, the government is also a great user of coal. It needs it now for its ships; it needs it for its arsenals; it needs it for manufacturing purposes in its mines; and in a thousand ways it is a great consumer of coal. These are now "lawful public uses," and although the policy of the government has always been to buy its coal in the market, yet the Executive may think the law should be changed, and he can therefore withdraw coal lands from the public domain for public use. And, according to appellant's contention, if he may withdraw some he may withdraw all; *ergo*, all of the coal deposits of the United States may be withdrawn from private entry under this executive power, notwithstanding existing laws providing for their private acquisition. The appellant's argument must to this complexion come at last.

Our answer to the inquiry at the head of this division of our argument would be:

(1) That the President's power to reserve public lands for public uses finds its sanction in acts of Congress;

(2) That even where no specific statute directly authorizes the executive act, it nevertheless derives its authority from an assumed grant by Congress, manifested by frequent enactments of statutes giving *like authority in like cases*; and

(3) That its extent is limited to the setting apart of particular tracts of land for specified public uses, as the exigencies of the public service may require.

VI.

Any executive duty to PROTECT the property of the United States will not warrant an order withdrawing the entire mineral-oil domain from the operation of laws which Congress has enacted, and which remain in full force.

Aside from appellant's contention that the withdrawal order of September 27, 1909, prevented the valid location of mining claims upon property included within the described areas covered by the withdrawal (which is the very question now in issue and under discussion), there is no allegation or suggestion in the bill, and there is no contention in the argument of the appellant, that the appellees, or their grantors, had in any way committed any trespass upon the public lands. It is not alleged, nor is it contended, that any fraud was practiced, or intended to be practiced, by appellees or their grantors. The acts of the locators of the mining claim in controversy were, unless prohibited by the withdrawal of September 27, 1909, clearly within rights granted to them by statutes of the United States.

But appellant's counsel try to find an argument in support of the withdrawal order of September 27, 1909, in an *implied* duty of the Executive to *protect* our shores from unauthorized use by or under a foreign power (Appellant's Brief, p. 77); to *protect*

our interstate commerce from unlawful obstruction (Appellant's Brief, p. 80); and to *protect* high officials of the government from unlawful and murderous assault when in the performance of their public duties (Appellant's Brief, pp. 81-89).

It seems superfluous to dwell upon this argument of appellant as having any bearing upon the subject now under consideration. The principles which they invoke are fully set forth in the case *In re Neagle* (135 U. S., 1). In the very extended discussion contained in that case, and by the citations given, the argument and conclusion of this court were in support of an executive power and duty to *protect* the agencies and the property of the United States against unlawful invasion or assault. Counsel for the appellant so understand the case, for they conclude from it that "the Executive is authorized to exert the power of the United States when he finds it is necessary for the *protection* of the agencies, the instrumentalities or the property of the government." And they add: "This does not mean an authority to disregard the wishes of Congress on the subject, when those wishes have been expressed." (Appellant's Brief, p. 88.)

We fully agree with counsel on this particular subject. This duty of protection of the agencies and property of the United States *is* incident to the executive office, but it is a protection under and in accordance with the law, and in fulfillment of the executive duty to take care that the laws be faithfully executed. This duty surely does not extend to a protection of some supposed future interest *against Congress itself*. In the case now under consideration the wishes of Congress *have been expressed*. Only twelve years be-

fore the withdrawal order of September 27, 1909, Congress had passed, and the President had approved, the act already mentioned, which provided "that any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims." A general act of Congress which had been in operation only twelve years, but under which rights were almost daily accruing down to the very moment of the making of the withdrawal order, cannot be called "obsolete." To say that in order to "protect" the property of the United States this law should be suspended, and all persons, although qualified, should be prohibited from doing the very things authorized by Congress, cannot be supported by the authorities cited by appellant.

The fallacy in this part of appellant's argument lies in the assumption that this executive power of "protection" extends to the prevention of acts by citizens which are in the exercise of rights especially granted by statute, on an executive theory that the statute itself is "unwise." No court has ever yet carried the duty of executive protection to this extent.

The answer to this contention of the appellant may be summed up by a few words taken from this court's opinion in *Kendall vs. United States* (12 Peters, 524, 613), already cited:

"To contend that the obligation imposed on the President to see the laws faithfully executed implies a power *to forbid their execution*, is a novel construction of the constitution, and *entirely inadmissible*."

VII.

The words contained in certain acts providing for agricultural entries or making grants of land, which except therefrom lands reserved "by proclamation of the President," or "by order of the President," or "by competent authority," will not sustain an order which withdraws the public mineral domain from the operation of existing statutes.

Words of the character here mentioned are cited by Justice Field in the case of *Grisar vs. McDowell*, *supra*, as evidencing a recognition of the authority of the President as applied to the case then under consideration, and to sustain the authority of the President "to order from time to time, as the exigencies of the public service required, *parcels* of land belonging to the United States to be reserved from sale and set apart for *public uses*."

Grisar vs. McDowell, 6 Wall., 381.

These expressions are used in certain statutes making specific grants of non-mineral land. They are used in the pre-emption acts of May 29, 1830 (4 Stat., 420), and of September 4, 1841 (5 Stat., 453). As we shall hereafter see, they have never been used in laws granting the right of private acquisition of mineral lands. These provisions in the acts in which they do occur are amply explained and justified, if not absolutely required, by statutes which had gone before.

As we have already seen, the President of the United States *by authority of Congress* had in numerous cases been empowered at his discretion to select

lands for specific public uses, and by proclamation or order to reserve such lands from sale. The proclamation or order under such statutory authority would have the same effect to create a reservation as would a specific act of Congress designating the lands for that purpose (*Wilcox vs. Jackson, supra*). It therefore seems unnecessary to seek for some meaning in these words of exception other than a recognition of the fact that there might be reservations made by proclamation or order under the authority of previous statutes. If, then, a new statute authorizing the private acquisition of public lands, or making a grant to a railroad or a state, did not make an exception of lands reserved by such proclamations or orders under such previous statutes, then the new statute might well be construed as revoking the authority theretofore given to the executive officer to make such reservation. A statement of the exception might well be deemed necessary to maintain in force an authority already given.

While we consider that the suggestions here made furnish sufficient explanation for the presence of such words in the statutes referred to, yet, if there had not been any such *previous* authorization to the President, then we submit that the only effect of such exceptions would be that the right to reserve by executive proclamation or order would apply to lands covered by the statute containing the exceptions, and *to them only*.

It is certainly contrary to the rules of statutory construction to say that the expression of a given right or reservation in one statute relating to one class of subjects should, by reference, or by some general theory of policy, be considered as included in some

other statute relating to another class of subjects from which the words are carefully omitted. The pre-emption law applied to *non-mineral* lands, and qualified citizens were permitted, under the terms of the statute, to acquire these lands by settlement, occupation, the making of entry in the land office, and the paying of certain fees; and from such *non-mineral* lands are made certain exclusions, including lands which have been reserved by order of the President. Now, surely, this provision, in such a statute, as to a reservation by order of the President cannot be held to control the provisions of another statute (in our case the mining laws) which grants the right to enter lands of a different character, and contains no corresponding words of reservation. To hold that the exceptions of the first statute extended to the second would be a violation of well-established principles of statutory construction.

“If, in a subsequent statute on the same subject as a former one, the legislature uses different language in the same connection, the courts must presume that a change of the law was intended.”

Black on Interpretation of Laws, p.
191.

Chief Justice Marshall, speaking for this court, has said :

“It is the province of the legislature to declare in explicit terms how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply

the rule to the case thus explicitly described—not to some other case which judges may conjecture to be equally dangerous.”

The *Paulina's Cargo*, 7 Cranch, 52, 60.

“Where the Constitution speaks in plain language, in reference to a particular matter, we have no right to place a different meaning on the words employed because the literal interpretation may happen to be inconsistent with other parts of the instrument in relation to *other* subjects.”

Cantwell vs. Owens, 14 Md., 215, 226.

Speaking of the words of a later statute, the Supreme Court of Pennsylvania says:

“That they differ from the words of a prior statute on the same subject, is an intimation that they are to have a different and not the same construction, for it is as legitimate a use of the legislative power to alter prior statutes as to displace the common law.”

Rich vs. Keyser, 54 Pa. St., 86, 89.

Speaking of two different statutes dealing with the same subject-matter, an English case says:

“If one uses distinct language imposing a penalty under certain circumstances and the other does not, it is always an argument that the legislature did not intend to impose

a penalty in the latter—for where they did so intend they plainly said so.”

Dickenson vs. Fletcher, L. R. 9 C. P.,
1, 8.

Speaking of different provisions of law, a very ancient English case says:

“And the several inditing and penning of the former part concerning distress given to executors, and of this branch, doth argue that the makers did intend a difference of the purviews and remedies, or otherwise they would have followed the same words.”

Edrich's Case, 5 Rep., 118; 77 English Reports (Full Reprint), 238.

See also:

Moser vs. Newman, 6 Bingham, 556;
130 English Reports (Full Reprint), 1395.

Speaking of a change of words in a statute, this court, after discussing the terms of the statute referred to, says:

“It will be observed, therefore, how general and comprehensive the first clause of Sec. 5339 is, and in comparison how restricted and special is subdivision three of Sec. 272. In other words there is omitted from the latter the words by which, we have seen, it was decided in *Winston v. United States*, *supra*, that the act of January 15, 1897, *supra*,

which was the first legislation giving the power to a jury to qualify their verdict, was applicable to the District of Columbia.

A change of language is some evidence of a change of purpose, and certainly it could not have been supposed that the words 'any lands reserved or acquired for the exclusive use of the United States,' used in Sec. 272, would be regarded as the equivalent in meaning of the words 'district of country under the exclusive jurisdiction of the United States,' used in Sec. 5339. And yet it is mainly on those words in Sec. 272 that appellant relies. The District of Columbia can hardly be said, as we have pointed out, to be in any proper or adequate sense 'lands reserved for the exclusive use of the United States,' while the words 'district of country under the exclusive jurisdiction of the United States' can be, as they had been, properly and adequately held to include the District of Columbia."

Johnson vs. U. S., 225 U. S., 405, 415-416.

See also:

U. S. vs. Perry, 50 Fed. Rep., 743, 748;
1 C. C. A., 648.

In the next division of this argument we shall further urge the inapplicability of any such words of exception as are above mentioned in the consideration of rights to mineral lands under the mining laws. But upon the discussion already presented, and under

the authorities already cited, we confidently contend that these excepting words in certain statutes cannot support Petroleum Withdrawal No. 5 of September 27, 1909.

VIII.

Prior to June 25, 1910, neither the President nor the Secretary of the Interior had any power to withdraw public MINERAL-OIL lands from location or entry under the existing mining laws.

In the foregoing discussion we have contended that *non-mineral* lands could be withdrawn from entry under the homestead or pre-emption laws only by authority of Congress directly expressed or clearly implied, and only to the extent required to comply with the congressional will. We have also contended (but not admitting the materiality of the matter) that actual reservations and appropriations of public lands for public purposes can be made only under statutory authority, or, in certain defined cases, in accordance with a long-continued congressional policy assumed by executive officers to constitute a *grant of power by Congress*, and this only as to designated parcels of land to be used for specified public purposes.

The conclusions already reached, largely based on decisions of this court, are inconsistent with the existence of any independent executive power to withdraw *mineral* lands from entry under the mining laws.

When, however, we come to consider the history of legislation in relation to mineral lands, and examine the existing statutes providing for their acquisi-

tion by private citizens, the argument becomes doubly conclusive against the validity of the withdrawal of September 27, 1909.

1. *Prior to 1866 Congress Itself Had Reserved All Mineral Lands from Sale, and This Congressional Reservation Left No Opportunity During That Period for Any Withdrawal of Mineral Lands by Executive Authority.*

From the foundation of the government congressional legislation has made a radical distinction between lands which were valuable for minerals and other lands constituting portions of the public domain. This fact has been recited and illustrated many times by decisions of this court. The early legislative action of this character related to salt springs and to lead mines.

On May 18, 1796, Congress passed an act providing for the sale of lands of the United States in the territory northwest of the Ohio River and above the mouth of Kentucky River. (1 Stat. L., 464.) It provided for a survey, and required that "every surveyor shall note in his field book the true situation of all *mines*, salt licks, *salt springs* and mill seats which would come to his knowledge." These provisions are now incorporated in section 2395 of the Revised Statutes. Section 3 of the act provided for the reservation of every salt spring which might be discovered, together with a section of one mile square which included it. (Ibid., 466.)

In another act, of June 1, 1797 (1 Stat., 490), pertaining to grants of land appropriated for military

reservations and for certain other purposes, a similar reservation was made.

By act of March 26, 1804, providing for the disposal of public lands, it was provided that—

“the several salt springs in the said territory, together with as many contiguous sections to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States.”

2 Stat. L., 280.

In another act, which has several times been before this court for consideration, being the act of March 3, 1807 (2 Stat., 448), it was provided—

“that the several *lead mines* in the Indiana Territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States.”

Provisions were made for leasing such mines. In the early legislation of Congress the word “mines” seems to refer to mineral deposits reserved and owned by the United States. In the original act creating the Interior Department it was provided—

“that the supervisory and appellate powers now exercised by the Secretary of the Treasury over the lead and other mines of the United States, and over the accounts of the

agents thereof, shall be exercised by the Secretary of the Interior."

Act of March 3, 1849; 9 Stat., 396.

As early as 1840 this court said:

"It has been the policy of the government at all times, in disposing of the public lands, to reserve the mines for the use of the United States."

United States vs. Gratiot, 14 Pet., 526,
537.

In 1845, referring to the law of 1807 concerning lead mines, this court said:

"In looking at that act, no one can fail to observe the care taken by the government to preserve its property in the lead-mine lands, or to come to the conclusion that the reservations of them can only be released by *special legislation* upon the subject matter of such reservations."

United States vs. Gear, 3 How., 120,
130.

The history of our legislation upon this subject was briefly reviewed by Mr. Justice Field in the case of *Deffeback vs. Hawke*, 115 U. S., 392, 400.

Text-writers give convenient summaries of this history. Thus it is said in Barringer & Adams on the Law of Mines and Mining, page 194:

"From the foundation of the government until 1866 the settled policy of the United States was not to part with the ownership of its mineral lands. From every grant they were reserved, so that the courts took the view that from this policy an intention to do so was implied in all cases."

Mr. Curtis H. Lindley, in the first volume of his valuable work on Mines (sec. 47, 2nd ed.), after review of the subject, says:

"Sufficient historical data has here been given justifying the conclusion reached by the courts in announcing the doctrine that prior to 1866 it had been the settled policy of the government in disposing of the public lands to reserve the mines and mineral lands for the use of the United States. Prior to that date uniform reservation of mineral lands from survey, from sale, from preemption and from all grants, whether for railroads, public buildings or other purposes, fixed and settled the policy of the government in relation to such lands."

Prior to 1866 the mineral deposits of the public domain had not been placed under the jurisdiction of the General Land Office or of the Department of the Interior. All such mineral lands were reserved from sale by acts of Congress and pursuant to an established and well-recognized governmental policy. This being so, there could be no power of reservation left to be exercised by executive officers.

It necessarily follows that prior to 1866 no *implied* authority—arising from exceptions in statutes granting lands or permitting the private acquisition of lands, or arising from any authority given to the executive department as to non-mineral lands—would vest in the Executive as to *mineral* lands.

While mineral lands were a part of the public domain, yet they were withheld by Congress for governmental use. They were not “public lands,” as that term is commonly used :

“The words ‘public lands’ are habitually used in our legislation to describe such as are *subject to sale* or other disposal under general laws.”

Newhall vs. Sanger, 92 U. S., 761,
763.

No precedents arising prior to July, 1866, and no *practice* of executive officers of withdrawing public lands from entry or sale prior to that date, can have any bearing on the question now under consideration.

-
2. *Since July, 1866, the Mining Laws Have Contained Complete and Exclusive Provisions as to the Control and Disposition of Public Mineral Lands.*

By act of May 5, 1866, Congress had recognized certain possessory rights acquired by citizens in mineral lands, but expressly provided that “nothing herein contained shall be so construed as granting a title

in fee to any mineral lands held by possessory titles in the mining states and territories." (14 Stat., 43.)

By act of June 21, 1866, Congress had extended certain rights under the homestead act, but in doing so expressly provided "that no mineral lands shall be liable to entry and settlement under its provisions." (14 Stat., 67.)

In the same year Congress made a provision as to mineral lands, which, with some modification, became thereafter section 2318 of the Revised Statutes, in the following words:

"In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law."

Here we have a statutory expression of the reservation of mineral lands, but with an exception which gives emphasis to provisions made for their disposition as being *expressly directed* by law.

Now, in the same year there came about a radical change in the policy of the government in relation to mineral lands, manifested by the act of July 26, 1866 (14 Stat. L., 251), which, with slight change of wording, so far as affects our present contention, was re-enacted in the act of May 10, 1872 (17 Stat. L., 91), and soon afterwards became section 2319 of the Revised Statutes, and since 1872 has been constantly in force. That provision of law is as follows:

"That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and pur-

chase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

17 Stat., 91.

Congress had previously amended the act of July 26, 1866, and by the act of July 9, 1870, had made this further provision:

"That claims, usually called 'placers,' including *all forms of deposit*, excepting veins of quartz, or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

16 Stat., 217.

This last-mentioned provision has become incorporated in the Revised Statutes as section 2329.

By the act of February 11, 1897, Congress provided:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils,

and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

29 Stat., 526.

Now, it will be observed that these statutes extend to *all* valuable mineral deposits in lands belonging to the United States, and to the lands containing such deposits, and provide that *any* qualified person may acquire petroleum lands under the mining laws. The sale of mineral lands, and their acquisition by private citizens, have been "expressly directed by law," and a right granted by law *can only be taken away by law*.

In *Deffebach vs. Hawke*, 115 U. S., 392, 404, Mr. Justice Field, after referring to the earlier mining statutes we have mentioned, thus summarizes them (the italics being his own) :

"It is there enacted that 'lands *valuable* for minerals' shall be reserved from sale, except as otherwise expressly directed, and that '*valuable* mineral deposits' in lands belonging to the United States shall be free and open to exploration and purchase."

We find in these statutes no reservation or exception. The words so frequently used in previous statutes relating to non-mineral lands, that there shall be excepted lands reserved by proclamation of the President, or lands reserved by order of the President, or lands reserved by competent authority, are not found in these statutes relating to the acquisition by citizens of lands containing mineral deposits. *Congress* could,

of course, at any time, by legislative action, before vested rights had accrued, reserve any lands, mineral or non-mineral, from the operation of previously existing laws. But if any executive authority had theretofore existed covering the power to withdraw other lands from entry or sale, such authority is expressly excluded in reference to mineral lands by the broad provisions of these statutes.

The statute of February 11, 1897, is what this court has called a "perpetual statute." Earlier acts relating to the acquisition of mining rights which we have quoted are of like character. This court has said:

"The rule is that a perpetual statute (which all statutes are unless limited to a particular time) until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an indication to the contrary may be raised by a general law which embraces the subject matter, is considered still to be the law in force as to the particulars of the subject matter legislated upon."

United States vs. Gear, 3 How., 120,
131.

The act of February 11, 1897, must, therefore, continue to be the law until repealed by some other act of Congress, or by the enactment of some other law which has the effect of repealing it. There has been no such repeal, and no repugnant law has been enacted.

The only answer made to this contention is, apparently, that the President has the power to suspend the operation of a statute of the United States; in other words, by himself, and by inherent right, to exercise the powers of *legislation*. If the power to suspend exists, then the power to repeal exists, because a suspension, if valid, will continue until either the Executive, or Congress by new act, revokes the suspension. It may, therefore, continue for years, and by the very act of suspension of the operation of the law the President is exercising the legislative power of repealing a law.

The power claimed is a most startling one; for, if the power exists as to laws relating to the mineral domain, it exists in like manner as to other laws. As said by the Supreme Court of Illinois:

"If it be considered that the President may reserve or appropriate the public domain to any purpose he may in his judgment deem useful to the country, without warrant or authority of law, why may he not, in like manner, appropriate the public treasure for similar objects?"

McConnell vs. Wilcox, *supra*.

As said by Secretary, afterwards Justice, Lamar:

"To so hold would indicate that the Executive might in violation of law put in reservation for military purposes any amount of lands, and thus take them out of the operation of the general laws. To assert such a principle is to claim for the Executive the power

to repeal or alter the acts of Congress at will."

Fort Boise Hay Reservation, 6 L. D.,
16, 18.

If a regulation of the Secretary of the Interior, who is vested with supervisory power over the public lands, to the effect that timber should not be taken from public lands for the purpose of smelting (although authorized by law for domestic uses), would be *legislation* as distinct from regulation (*U. S. vs. United Verde Copper Co., supra*), then to suspend altogether a plain, definite statute of the United States is also *legislation*.

If, as recently said by this court in *U. S. vs. George, supra*, it is indubitable that the sections giving supervisory power to the Secretary and to the General Land Office (secs. 441 and 453) confer an administrative power only, and that "under the guise of regulation, legislation cannot be exercised," then, surely, under these sections, the Secretary cannot suspend the operation of a public law of the United States; for this again would be *legislation*. The constitutional obligation of the President is to "take care that the laws be faithfully executed" (Art. II, sec. 2), and this court has said, as we have already quoted, that—

"To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."

Kendall vs. United States, *supra*.

Mr. Justice Brewer, speaking for this court, has said :

"It has been wisely and aptly said that this is a government of laws and not of men ; that there is no arbitrary power located in any individual or body of individuals, but that all in authority are guided and limited by those provisions which the people have through the organic law declared shall be the measure and scope of all control exercised over them."

Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79, 84.

Chief Justice Marshall, in the case of *Marbury vs. Madison*, said :

"Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be the theory of this principle will never be maintained."

1 Cranch., 166.

Justice Miller, speaking for this court, says in the case of *The Floyd Acceptances* :

"We have no officer in this government, from the President down to the most subordinate agent, who does not hold office under the law with *prescribed* duties and *limited* authority."

7 Wall., 666, 676-677.

On February 11, 1897, Congress, *by express direction of law*, provided for the private acquisition of mineral-oil lands under the mining laws. The act was on that day approved by President Cleveland. Within less than a month thereafter there was a new Chief Executive. Now, could President McKinley on March 5, 1897, have set aside this law by withdrawing from all location or entry the entire mineral-oil domain? If not (and argument for such power is entirely inadmissible), then did President Taft have such authority in 1909, in the conceded absence of any change of the law which either expressly or impliedly conferred such authority? If so, then just *when* and just *how* did he obtain such authority? The statute of February 11, 1897, was just as operative, just as immune from executive interference, on September 27, 1909, as it was on the day following its enactment. If the contention of the government in this case can be sustained, then it follows, as a logical sequence, that as often as Congress actually legislates, just so often may its will be immediately thwarted by the Executive "in aid of" other and different legislation which the Executive desires.

Upon the principles fully set forth in the foregoing discussion, and in the light of the strong, definite, and unambiguous language of the mineral land laws above quoted, we respectfully insist that, without some authorizing act of Congress, neither the President nor the Secretary of the Interior, prior to the 25th of June, 1910, had any authority to suspend, for any time whatsoever, the operation of the act of May 10, 1872 (now section 2319 of the Revised Statutes), or of the act of February 11, 1897, above quoted.

3. *Origin of the Practice of Withdrawing Large Areas of Public Lands from the Operation of Existing Laws.*

The practice of withdrawing large tracts of public lands from the operation of existing laws, without the support of a previous act of Congress authorizing the same, commencing, as it did, in the administration of President Roosevelt, and when Mr. Garfield was Secretary of the Interior, is fully explained by the views of Secretary Garfield, already cited, to the effect that—

“full power under the Constitution was vested in the executive branch of the government, and the extent to which that power may be exercised is governed *wholly by the discretion of the executive*, unless any specific act has been *prohibited* either by the Constitution or by legislation.”

President Taft's administration, inheriting this practice from its immediate predecessor, at first continued to make such withdrawals on the assumption that the Executive had power so to do, but, apparently, without any special investigation, until after the withdrawal had been made, as to whether such power in fact existed. It was under these conditions that Petroleum Withdrawal No. 5 was made on September 27, 1909. After that date the then Secretary of the Interior called upon the Assistant Attorney General for the Department of the Interior for his views as to the authority of the executive department to make such withdrawals of lands, and in April, 1910,

Mr. Oscar Lawler, then Assistant Attorney General, delivered to the Secretary of the Interior a very complete brief upon the subject, in which he came to the conclusion that the executive branch of the government did *not* possess this power of withdrawal without preceding congressional authority; the concluding words of Mr. Lawler's argument being as follows :

"The President, in common with every other officer of the United States, is a creature of the law, subordinate and not superior thereto; his power to withdraw lands from disposition, like every other official act, must find justification in the source from which all authority must emanate—the law. The foregoing authorities show that it can find no such justification—hence it has no existence."

We have already shown, as indicated in the President's message of January 14, 1910, that he deemed it necessary for Congress to *validate* the withdrawals which had been made by the Secretary of the Interior and the President, in order to assure their legality. Senator Borah, in an address delivered in the United States Senate on the 11th of May, 1910, quoted from an address made by the President a few days before at Passaic, New Jersey, in which (with that freedom in taking the public into his confidence which was a characteristic of Mr. Taft) the President discussed the subject of the immense withdrawals that had been recently made, aggregating over sixty million acres, and spoke of the necessity of legislative action to approve these withdrawals, there being then

pending in Congress a bill for that purpose, which had passed the House, but had not passed the Senate. The President in that address said:

"The absolute necessity of this act arises from the very grave doubt whether the reservation of sixty million acres, if subjected to the tests of legality in the courts, could stand it. It is a very grave question whether the Executive has the power to make reservations thus *in extenso*, merely to avoid the disposition of the land under existing congressional enactment."

In view of the authorities already cited, and the principles already discussed, we would state it even more strongly than did President Taft, and say not only that there is a very grave doubt, but there is an actual certainty that the Executive has not the power to make such reservations, except upon authority previously granted by Congress.

Now, these large withdrawals, previous to the one made by the Secretary on September 27, 1909, were withdrawals of lands not controlled by the mining laws we have quoted; and the laws relating to the disposition of *non-mineral* lands did, for many years at least, contain the provision frequently cited in this argument, that there should be excepted from the rights given under the act such lands as should be reserved by order of the President; which exception, however, was made, as we have heretofore shown, for the protection of withdrawals made by the President under previously vested authority. But, as we have already persistently urged, the mineral-land laws do

not furnish even the doubtful argument which such acts relating to the non-mineral land might, by inference, have suggested; for as to the metalliferous and mineral oil lands, *all* of them without exception, with no suggestion of executive reservation, were declared to be open for entry by qualified persons, and every argument which could have been made to sustain the withdrawal of non-mineral lands absolutely fails when applied to the case of mineral oil lands.

4. *No "Long-Continued Practice" or "Customary Usage" Can Be Found to Support the Withdrawal of Mineral Lands from the Operation of Existing Laws.*

We have already called attention to the fact that prior to the enactment of the mining laws, commencing in July, 1866, there was no possibility that any practice or customary usage of the executive department in reference to the withdrawal of lands could furnish an argument for the withdrawal of mineral lands, because such lands were already, by *legislative* action, reserved from any sale or disposition, and were held for government use or subsequent disposal by specific enactment. Congress then passed a law, already quoted, expressly declaring that "in all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law." Here was a renewed *legislative* reservation of all mineral lands from sale. Express directions of law were then made as to the disposition of mineral lands, and the mineral laws constitute a separate and distinct code of laws. The provisions for the private

acquisition of mineral lands are completely and radically different from any other laws pertaining to the acquisition of any other portions of the public domain. If, therefore, an argument is to be based upon a long-continued practice, or customary usage, of withdrawing lands from sale, such practice or usage must, in order to have a bearing on the present controversy, relate to *mineral* lands. We confidently state that prior to September 27, 1909, there had been no such practice, either long-continued or short-lived; that there had been no such usage, either customary or sporadic.

The appellant attempts to answer this contention by saying that by executive authority there have been some *appropriations* of lands for military reservations, or *some setting apart of specific lands* for occupancy by the Indians, and that such appropriated lands sometimes contained mineral deposits.

In support of this contention counsel cite *Gibson vs. Anderson*, 131 Fed. Rep., 39, and *Behrends vs. Goldsteen*, 1 Alaska, 518, 524. In both of those cases there had been an actual appropriation and occupation of lands for recognized public uses. We have already commented upon *Gibson vs. Anderson*. In the case of *Behrends vs. Goldsteen* the court outlines the acts and documents evidencing the appropriation, and says:

"Did the action of the naval officers, including that of the Secretary of the Navy * * * together with the *continuous possession and occupation* up to the present time * * * present such acts and evidence as under the authorities *constitute a reservation?*" (pp. 523-524).

The court held that they did.

Our argument does not imply, and we do not contend, in cases where lawful appropriations of land have been made for specific public purposes, that any lands included in such areas lawfully appropriated and reserved are excluded from the appropriation or reservation by reason of the fact that they are found to be valuable for mineral. The integrity of the appropriation or specific reservation for a public use does not depend upon that question. The rule in such cases we have already quoted, as set forth by this court in *Scott vs. Carver, supra*. It is—

“the rule that whenever a statute is passed containing a general provision for the disposal of public lands, it is, unless an intent to the contrary is clearly manifest by its terms, to be held inapplicable to lands which for some *special public purpose* have been in accordance with law taken full possession of by and are in the *actual occupation* of the government.”

What we contend is that there has never been a practice and never been a usage on the part of executive officers of *withdrawing* public mineral lands from location or entry under existing laws. Vast withdrawals of public lands were made during the administration of President Roosevelt. Whether lawfully or unlawfully withdrawn it is immaterial for us in this case to consider, because they were in all cases the withdrawal of lands from *agricultural* entry. That administration, notwithstanding the doctrine promulgated by Secretary Garfield, did not attempt to

withdraw the mineral lands from the operation of existing laws. The order of September 27, 1909, being the order now under consideration, was the first order of this character. It is not only unsupported by any *practice* or *usage*, but it is without precedent. The question as to its validity must be determined upon its own merits, when compared with the laws which it attempts to suspend.

We submit as indisputable propositions:

(1) That to withdraw large tracts of the public mineral domain from the operation of the acts of May 10, 1872, and of February 11, 1897, was to suspend the operation of those laws.

(2) That to so suspend the operation of laws is *legislation*—not regulation.

(3) That neither the President nor the Secretary of the Interior possesses legislative power (except as to the President's power of veto).

(4) That prior to June 25, 1910, Congress gave no power to either the President or the Secretary to suspend the operation of the acts above mentioned, or to deprive citizens, even for a single day, of rights conferred by those laws.

Therefore, the order of September 27, 1909, was wholly void, and could not prevent the location and acquisition, by qualified citizens, of claims on mineral oil lands, in the manner then prescribed by law.

IX.

The act of June 25, 1910, did not validate any previous withdrawal, it did not authorize the ratification or confirmation of any such previous withdrawal, and the withdrawal order of July 2, 1910, did not affect any rights previously acquired under existing mining laws.

1. *The Act Did Not Validate, or Authorize the Validation of, Any Previous Withdrawals.*

After the withdrawal of September 27, 1909, and at the opening of the next session of Congress, there was submitted the report of the Secretary of the Interior for the year 1909. In that report the Secretary of the Interior states that—

“if material progress is to be made in securing the best use of our remaining public lands Congress must be called upon to enact remedial legislation.”

Report, p. 8.

After treating of coal deposits and recommending the leasing of coal lands on specified terms, the Secretary says:

“The above suggestions with reference to the disposition of coal deposits are equally applicable to the oil and gas fields in the public domain, and *similar legislation* as to lands containing the same is hereby recommended.”

Report, p. 9.

The Secretary also states that he has recently withdrawn temporarily, for the purpose of submitting the subject to Congress for "new legislation," large areas of oil lands, of which he gives a table, and he calls attention to the importance of asking Congress—

"to authorize the Executive to reserve certain areas of these lands for the purpose of affording a supply of fuel oil for the future uses of the Navy, and to make such regulations as may be necessary for the preservation and extraction of such deposits."

Report, p. 11.

He later gives a table which "does not include lands withdrawn under specific statutory authority," showing the withdrawal up to November 1, 1909, of various areas of lands of varying character, aggregating 62,115,242 acres and including oil lands to the amount of 3,621,062 acres; and then he adds:

"As the legal authority of the Secretary of the Interior to make even temporary withdrawals of public lands, for the purpose of submitting to Congress what may appear to the Secretary as an exigency requiring new legislation applicable to their proper use and disposition, has been questioned, it is recommended that Congress give specific authority to make temporary withdrawals of public lands in such cases."

Report, p. 16.

President Taft sent a special message to Congress, on the subject of conservation of natural re-

sources, on January 14, 1910. In that message he makes the statement already quoted, to-wit:

"The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statutes would be detrimental to the public interest, is not clear or satisfactory. This power has been exercised in the interest of the public *with the hope that Congress might affirm* the action of the executive *by laws* adapted to the new conditions. Unfortunately Congress has not thus far fully acted on the recommendations of the executive, and the question as to what the executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to *validate the withdrawals* that have been made by the Secretary of the Interior and the President, and to *authorize* the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise."

Message, pp. 4 and 5.

Later in the same message the President, after alluding to the report of the Secretary of the Interior above mentioned, says:

"I earnestly recommend that all the suggestions which he has made with respect to these lands shall be embodied in statutes, and

especially that the withdrawals already made shall be validated so far as necessary, and that the authority of the Secretary of the Interior to withdraw lands for the purpose of submitting recommendations as to future disposition of them where new legislation is needed shall be made complete and unquestioned."

Message, pp. 8 and 9.

Now, in response to these urgent appeals of the President, what did Congress in fact do?

There were then pending in Congress a number of bills relating to the control and disposition of public oil lands of the United States. The appellant, in the appendix to its brief (p. 123), gives a list of six such bills which were pending before this special message of the President was sent to Congress. After that message was sent to Congress, and commencing on January 18, 1910, other bills were introduced, which the appellant also lists in the appendix to its brief. Between January 14, the date of said message, and April 19, 1910, seventeen new bills were introduced in the House and Senate bearing upon this subject, as so listed by the appellant, including House Bill No. 24,070, introduced April 5, 1910, upon which extensive hearings were held on May 13 and 17, 1910, being the hearings to which reference is made in appellant's brief.

One of these bills did actually pass the House and was sent to the Senate. It gave authority for the withdrawal of public lands from location, settlement, filing, and entry "for public uses or for examination

and classification to determine their character and value," and, when in his judgment public interest requires it, the President was by that act authorized to withdraw lands, whether classified or not, and "submit to Congress recommendations as to legislation respecting the lands so withdrawn." That bill as so passed by the House expressly provided that "all withdrawals heretofore made and now existing are hereby ratified and confirmed as if originally made under this act."

H. R. No. 24070.

Congress was not neglectful of the subject. The number of bills introduced, as above stated, shows the interest which had been aroused. But there was a great difference of opinion in Congress as to the merits of the recommendations of the President in reference to the change of existing laws. Majority and minority reports of committees were made, and the subject was very extensively debated. We have already alluded to the speech of Senator Borah, delivered in the Senate on May 11, 1910.

Whatever may be the opinions of committees, either the majority or minority, and whatever may be the private views of individual senators or representatives, the will of Congress is only to be determined by the actual resultant legislation, and legislation did result in this case in the act of June 25, 1910 (36 Stat. L., 847), entitled: "*An Act to Authorize the President of the United States to make withdrawals of public lands in certain cases.*"

This was the only legislation which resulted from the numerous bills that had been introduced, or pur-

suant to the urgent recommendations of the Executive and the Secretary of the Interior. The first section of that act provided as follows:

"That the President may at any time in his discretion temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for *water power sites, irrigation, classification of lands, or other public purposes, to be specified in the orders of withdrawals*, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress."

This enactment speaks only *in futuro*. It is not in any respect retroactive. This court has said:

"As a general rule for the interpretation of statutes it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only."

Murray vs. Gibson, 15 How., 420, 423.

" * * * it is of the very essence of a new law that it shall apply to future cases, and such must be its construction unless the contrary clearly appears."

McEwen et al. vs. Den, Lessee, 24 How., 242, 244.

See also :

Harvey vs. Tyler, 2 Wall., 328, 347.

Sohn vs. Waterson, 17 Wall., 596, 599.

Twenty Per Cent Cases, 20 Wall., 179, 187.

Chew Heong vs. U. S., 112 U. S., 536, 559.

Now, this act of June 25, 1910, contains no validating or ratifying words whatever as to previous withdrawals. The ratifying words, contained in the bill as it passed the House, were stricken out in the Senate. The act, as passed and approved, gives no authority to the President or Secretary of the Interior to validate any such previous withdrawals, and, on the contrary, it very carefully abstains by express provision from any ratification of previous withdrawals. In the second section of the act we find this clause :

“And provided further that this act shall not be construed as a recognition, *abridgment* or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands *after* any withdrawal of such lands made prior to the passage of this act.”

We call the attention of the court at this point to the fact that the rights of the appellees in this case come strictly within the words of this proviso, for the rights to be determined in this case are “asserted rights or claims initiated upon” oil lands *after* the withdrawal of September 27, 1909, and *prior* to the passage of the act of June 25, 1910.

In the course of the debate upon the bill resulting in this act, Senator Nelson called attention to this clause, and he said :

"I am aware of the fact that the men who occupied these oil fields out there [referring to California] did so after the lands were withdrawn under the former administration. They questioned that withdrawal, and it is possible the courts may sustain them and hold that the withdrawals were illegal ; but whatever the law of the case may be *this bill does not attempt to interfere with that*. It leaves them with their rights to be adjudicated *just as though this bill never became a law*."

Cong. Rec., Vol. 45 (Part 7), p. 7474.

Senator Nelson also made the further statement in the Senate, to-wit :

"The bill contains this further provision : 'And provided further that this act shall not be construed as a recognition, abridgment or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands under any withdrawal of such lands made prior to the passage of this act.' Thus it is intended to leave the door perfectly open for those people who went on to oil lands in California that were withdrawn under the former administration. It leaves them exactly with the rights they think they have under existing laws."

Cong. Rec., Vol. 45 (Part 7), p. 7475.

The purpose of the act of June 25, 1910, was manifestly to leave to the courts to determine whether or not the withdrawal of September 27, 1909, at the time it was made, was valid. If it was not valid, rights initiated during the period of withdrawal, it is expressly provided, shall not be *abridged*.

That the date of the act was to be the point of time from which there was legislative restriction of the right of location and entry of oil lands is clearly shown by an amendment to section 2 of the act of June 25, 1910, which amendment was approved August 24, 1912 (37 Stat. L., 497). The last-mentioned act amended section 2 of the act of June 25, 1910, so as to provide that all lands withdrawn under the act should nevertheless be open to exploration, discovery, location, and purchase under the mining laws, so far as the same apply to *metalliferous* minerals, and then amended the proviso we have above quoted so that the same should read as follows:

"Provided, further, that this act shall not be construed as a recognition, *abridgment* or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands *after* any withdrawal of such lands made prior to *June 25, 1910*."

It would seem, then, perfectly clear that such rights and claims as are now asserted by the appellees in this case, originating, as they did, after the withdrawal of September 27, 1909, and prior to June 25, 1910, are not affected by the act of June 25, 1910, and are to be construed by this court the same as if such act had not been passed.

2. *The Attempted Ratification of Previous Withdrawals Contained in the Order of July 2, 1910, Is Void.*

When we see that the withdrawal act of June 25, 1910, did not validate any previous withdrawal of public lands from the operation of existing laws, we are bound to conclude that that part of the order of July 2, 1910, which attempts to ratify and confirm previous withdrawals is in itself void. So much of the order of withdrawal, Petroleum Reserve No. 8, based upon the statute of June 25, 1910, as relates to the *then future* is doubtless valid, because it is made pursuant to statute, and from the date of that order, under the authority of the statute, the lands described are to be deemed withdrawn from settlement, location, sale, or entry, except where vested rights had then accrued.

The form of Withdrawal No. 8, like the form of the Order of Withdrawal No. 5, seems to have been prepared by the Director of the Geological Survey (Record, p. 9, fol. 10), and it seems to have been hard for him, in framing the withdrawing orders, to yield even to the plainly manifested views of Congress. He therefore attempts in the draft of "order of withdrawal Petroleum Reserve No. 8" to ratify and confirm the various previous withdrawals, commencing with the one of September 27, 1909. We submit that this was plainly beyond any authority given by the act of June 25, 1910; and that the President himself doubted the efficacy of the attempted ratification appears in the fact that the order also *withdrew* the same lands from future location or entry.

President Taft in his speech at the Conservation Congress in St. Paul, a copy of which speech he transmitted to Congress with his message of December 6, 1910, expressly stated that the act of June 25, 1910, did not validate the withdrawal orders made by him in September, 1909. He says:

"The law as passed does not expressly validate or confirm previous withdrawals, and, therefore, as soon as the new law was passed I myself confirmed all the withdrawals which had theretofore been made by both administrations, *by making them over again.*"

Message December 6, 1910, p. 92.

A confirmation of withdrawals which results from "making them over again" can, manifestly, apply only to the then future. It could not affect adverse rights which had arisen prior to the re-withdrawal.

Temporary Withdrawal No. 5, of September 27, 1909, was expressed to be for one purpose only, and that was "in aid of *proposed legislation* affecting the use and disposition of the petroleum deposits of the public domain." No other purpose whatsoever is given. Now, the purpose so indicated is not a purpose even recognized by the act of June 25, 1910. That act authorized the temporary withdrawal and reservation of lands "for water power sites, irrigation, classification of lands or other *public purposes to be specified* in the orders of withdrawal." There was good reason for omitting any reference to proposed legislation, because legislative matters rest entirely with Congress. The President, indeed, has the power, by message to Congress, to recommend legislation, as he

did recommend legislation upon this subject; but, except for the power of veto, this is the only relation which the President has to legislation, and no authority has ever been given by law to the President to suspend the operation of existing laws of Congress because the President himself desires to recommend to Congress the enactment of some other legislation which would be different from that which was then in force. Otherwise the entire public domain would be controlled by what the President for the time being might think *should be the law*—not by what Congress has said it shall be.

We have already called attention to the fact that President Taft recognized these withdrawal orders, including that of September 27, 1909, as having the effect of suspending the operation of existing laws. His language upon that subject is found in his message of December 10, 1910. Speaking of this very act of June 25, 1910, he says:

“At its last session this Congress took most useful and proper steps in the cause of conservation by *allowing* the executive, through withdrawals, to suspend the action of the existing laws in respect to much of the public domain.”

Message, pp. 56-57.

This language is peculiarly significant, in showing not only that the withdrawal was the suspension of the operation of existing laws, but that the President himself considered his authority in making withdrawals resulted from Congress “allowing” this power

to the Executive. (No such power had been *allowed* by Congress prior to June 25, 1910.)

The difficulty with the executive officers who have managed these withdrawals—and they seem to emanate from the Director of the Geological Survey—is a difficulty which is too prevalent at the present day. Officers whose duties are purely *administrative* suddenly conceive that it is desirable to change national *legislative* policies; and, *presto*, the change must be *immediate*. They are unwilling to await the orderly processes of the law. Congress admittedly has complete and exclusive power over the public lands, mineral and non-mineral. Congress is in session every year, and for a large part of the time. The President can any day, when it is in session, send it a message with his recommendations (or appear before it in person). If the necessity for action is urgent, he can call attention to the urgency, and Congress is at hand, ready to do whatever it shall deem needful for the preservation or disposal of the public domain. If it is not in session, it can be convened on short notice. To say on September 27 that it is necessary to immediately withdraw from the operation of long-existing land laws more than three million acres of mineral land, being all the known mineral-oil land of the country, and to do so by executive fiat, when it is known that early in the following December Congress will be in session, that the President can make his recommendations, and that congressional action can be speedily taken—as speedily as *Congress* shall see fit—is to manifest an utter disregard of constitutional and legal restraints. The only safe rule is for the different branches of the government to keep within those lim-

itations which the Constitution and the laws have prescribed for their guidance and direction; otherwise government will advance through chaos to despotism.

We respectfully insist that the act of June 25, 1910, and the order of July 2, 1910, can have no effect as against the vested rights acquired by the original claimants mentioned in the present bill, which rights had been acquired as early as May 5, 1910.

X.

Prior to the approval of the act of June 25, 1910, appellees' grantors had acquired vested rights in the property in controversy, and on June 25, 1910, these rights could not be affected even by act of Congress, much less by an executive order.

The only attack made in the bill upon the rights of the appellees and their grantors is based upon the proposition that the lands which were entered upon had been lawfully withdrawn by the order of September 27, 1909, and that, therefore, citizens could not acquire any rights therein under the mineral-land laws.

If we are right in the contention we have so extensively argued, that the order of withdrawal of September 27, 1909, was wholly void, then the question will arise as to whether the rights acquired in the meantime were of such a character as would be protected against subsequent legislation or authorized executive orders.

It must be assumed, for the purposes of this case, that the original claimants were qualified to enter

public lands under the mining laws. There is not a suggestion made that they were not so qualified. It is a general proposition that the allegations of a pleading must be construed most strongly against the pleader. If there was any reason for assailing the rights of the original claimants by reason of any disqualification in law to make the entry, that fact should have been alleged. It is not alleged. The presumption is in favor of the qualification of the parties making the location and discovery, and it is not contended in this case that this presumption is not a conclusive one for the purpose of this hearing.

Such being the case, what are the facts as appearing in the bill? They are: that the appellees' grantors, called "original claimants," entered upon the land in controversy as a part of the mineral oil domain of the United States, and open to location under the mineral-land laws, as early as March 27, 1910; that they worked diligently; sunk a well to a great depth, and necessarily at great expense; that in this well on May 5, 1910, they had discovered mineral oil in great quantity, and of great value; and that, the discovery having been made, they filed their location certificate in the proper office. Now, assuming that the claimants were qualified citizens of the United States, or persons who had declared their intentions to become such, and assuming, as we must, in view of this discussion, that these mineral lands were subject to entry, and had not been lawfully withdrawn from the operation of the mineral-land laws, then it is very clear that, before the enactment of the law of June 25, 1910, the rights of the locators had been perfected in the manner contemplated by the mineral-land laws; and while

there is no allegation in the bill that they had applied for final entry in the land office, or obtained receiver's receipt, yet the allegations of the bill do show that the grantees of the original claimants were continuously in possession of the property, and still continue in such possession. We have, therefore, the elements (1) of location by presumably qualified locators; (2) work performed in perfecting the location; (3) discovery of the mineral in paying quantities, showing the land more valuable for the mineral oil produced than for other purposes; (4) the filing and recording of location certificate; and (5) continued assertion of right and continued possession up to the time of the bringing of this action.

Now, under these facts, what is the law as to the rights of the locators and their grantees? The decisions of this court are not silent upon the subject.

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. *Forbes v. Gracey*, 94 U. S. 762. * * * The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,' which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time."

Belk vs. Meagher, 104 U. S., 279, 283.

"A valid and subsisting location of mineral lands, made and kept up in accordance

with the provisions of the statutes of the United States, has the effect of a *grant* by the United States of the right of present and exclusive possession of the lands located."

Gwillim vs. Donnellan, 115 U. S., 45, 49.

Speaking of placer-mining claims, this court says:

"Such locations when perfected under the law are the property of the locators, or parties to whom the locators have conveyed their interest. As said in *Belk v. Meagher*, 104 U. S. 279, 283, 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent.' *It is not, therefore, subject to the disposal of the government.*"

Noyes vs. Mantle, 127 U. S., 348, 353.

In a later case, this court, after quoting in full section 2319 of the Revised Statutes, then continues as follows:

"And by Section 2322, it is provided that when such qualified persons have made discovery of mineral lands and complied with the law, they shall have the exclusive right to the possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without in-

fringing the title of the United States, and that *when a location is perfected* it has the effect of a *grant* by the United States of the right of present and exclusive possession." (Citing cases.)

Manuel vs. Wulff, 152 U. S., 505, 510-511.

See also :

1 Lindley on Mines, secs. 169, 539.

1 Snyder on Mines, secs. 451, 466.

Mr. Justice Van Devanter, of this court, when Assistant Attorney General for the Department of the Interior, had occasion to discuss this subject in giving an opinion on the act creating the forest reservation known as the Yosemite National Park. A proviso in that act excepted any *bona fide* entry made on the land prior to the approval of the act. In the case then under consideration there had been "a mining claim duly *located* and held in compliance with the mining laws at the date of said act," but there had been no "entry" of that mining claim. In the opinion it is said :

"The right to the possession and use of such a claim, and ultimately to perfect title to the same in accordance with the mining laws, was a property right, and was just as much protected by the constitutional guaranty that private property shall not be taken for public use without just compensation

as was 'any bona fide entry' mentioned in said proviso."

25 Land Decisions, 48, 51.

The mining claim located and held by the grantors of appellees, being the land now in controversy, on the 5th day of May, 1910, was their *property*, and their property right was protected by our fundamental law; for it is provided in the Fifth Amendment to the Constitution of the United States that no person shall "be deprived of life, liberty or *property* without due process of law."

XI.

Sundry comments on the argument of appellant.

We have attempted in the preceding pages completely and fairly to cover all phases of the question here involved, but, after receiving the printed argument of appellant, a few additional suggestions seem pertinent.

1. The appellant contends "that a reservation by the President will be upheld if it may be upheld on any *possible hypothesis*." (Brief, p. 6.)

This very statement shows the weakness of appellant's cause. It recognizes the fact that it must go outside of the Constitution and outside of the laws to find some "hypothesis" on which to base a plausible (possible?) argument in support of this withdrawal. But, as "we have no officer in this government from the President down to the most subordi-

nate agent who does not hold office under the law, with prescribed duties and limited authority" (*The Floyd Acceptances, supra*), it is manifest that the President's authority in this case must find its source in the law; otherwise it does not exist.

2. Counsel say that at the time of the withdrawal order "there was an *emergency*; there was no time to wait for the action of Congress." (Brief, p. 11.) Wherein was there such an "emergency"? There were then several millions of acres of unappropriated and unlocated oil lands on the public domain. Only a trifling portion of this vast area would be needed for naval use, even when Congress should authorize such use. These oil deposits were not newly created, nor even newly *discovered*. No customary use of the government was being in the slightest degree restricted or infringed. If private citizens produced oil, they would produce it for sale, and the government could still, as it was then doing and always had done, purchase what it needed. The law also then provided an adequate method for the private acquisition of oil lands—that law still continues to the present day. Did the executive view that this long-existing law was unwise constitute an "emergency"? If the term "emergency" can be used as to this withdrawal, it can be used in support of *any* action the President may take in suspending the operation of existing law.

3. Appellant contends that the action of the President is justified because bills on the subject were then pending in Congress. (Brief, p. 12.) "The whole subject was before "Congress." (Brief, p. 13.)

How different is the situation here presented from that revealed in the *Bullard* case! (*Supra*, p. 68.) In that case, pursuant to supposed antecedent authority of Congress, specific lands had been withdrawn to satisfy a grant. The grant was to a state. There were great differences of opinion among heads of department as to the scope of the grant. After decision by this court, bills were introduced in Congress which resulted in giving to the state the whole amount of lands originally withdrawn. In the meantime the original withdrawal had never been revoked. In our case there was no antecedent authority, either express or implied—no authority to be construed either rightly or wrongly. There was no accompanying grant of lands. There was no appropriation of land for government use. There was no setting apart of specific lands for any public purpose. The order of September 27, 1909, was simply an unheralded withdrawal of the entire mineral-oil domain from the operation of existing laws. To say that the mere pendency in Congress of bills (which, *if enacted into law*, would give the power of withdrawal) would give such power *in advance* of the enactment of laws, involves peculiar reasoning. Under this theory, whenever the President thinks an existing law should be changed, all he has to do is to have some administration member introduce a bill on the subject, and then straightway, without awaiting congressional action on that bill, he may suspend the operation of existing laws on the subject. We respectfully submit that no such derivation of executive power can be sanctioned by the courts.

4. Appellant's counsel, speaking of the act of June 25, 1910, say :

"Its necessary import is to approve the policy of reserving the oil and the other minerals specified, and to approve the reservations previously made."

Brief, p. 13.

We have fully discussed the proposition that that act *did not* approve the reservations previously made, but expressly avoided doing so. But what is to be said of counsel's contention that the act approved the *policy* of reserving oil and the other minerals specified? This suggestion of counsel is at least peculiar, in view of the nature of the issue in this case. We find no fault with any *congressional* policy in *authorizing* withdrawals of mineral lands from the operation of previous laws. That is a proper function of Congress. We have so contended throughout this argument. The question here is not as to the wisdom of a *policy* of withdrawing oil lands from entry. The question is: Could the President lawfully order such withdrawal, without previous authority from Congress? The fact that Congress did in 1910 give the President power to make such withdrawals is surely no argument that he had that power in 1909. True reasoning from the premises would lead to the exactly opposite conclusion. If it was necessary for Congress to give him such authority, it was because he did *not* possess it until it was granted by Congress.

5. Appellant's counsel quote Justice Story as placing the slowness of the processes of

Congress among the reasons for not giving it control of the *army and navy*, and for lodging the *pardonning power* with the President. (Brief, p. 71.) Justice Story was giving reasons why the framers of the Constitution distributed the governmental powers as they did. But the same framers of the Constitution made an entirely different provision concerning the public lands, and placed the power to control and regulate such lands exclusively in Congress. In the opinion of the makers of the Constitution, "the slowness of the processes of Congress" furnished no reason for taking from Congress the power in all respects exclusively to control the public lands.

6. Speaking further of the delays in Congress, the counsel for appellant say :

"This procrastination and the *public notoriety* which attends their deliberations unfit such bodies for the performance of those acts of government which demand *celerity*, and for those also which demand *secrecy in preparation*."

Brief, p. 71.

This language suggests the words of Justice James Wilson, who says :

"The advantages of a *monarchy* are strength, dispatch, secrecy, unity of counsel."

Wilson's Works, Vol. 1, p. 544 (Speech before Pennsylvania Convention, Nov. 26, 1787).

There are, indeed, those who think that more power should be vested in the Executive than our Constitution has placed there; that the President should have more the power of a *monarch* than our form of government accords to him. But we live under a Constitution which has worked well in the past—we believe will work well in the future. In any event, it is the ultimate and controlling law which limits the powers of officials and regulates and controls the rights of citizens. But, when the question involves a scheme of governmental policy in reference to the vast public domain, why is great haste necessary? Why should there not be "public notoriety" attending deliberations upon a subject which affects so many? Why should there be "secrecy in preparation" in matters which tend to overturn long-existing law?

The words of counsel on this subject suggest an additional objection to these executive withdrawal orders (not authorized by previous legislation). When a statute is amended, or a new public policy is inaugurated by Congress, the "public notoriety" which attends the deliberations of Congress has the effect of advising the people at large of what is being done, and they are prepared to receive and act upon the final legislative mandate. But when an executive withdrawal order is made (not authorized by previous statute), it is marked by "secrecy in preparation," and we may admit that it is marked by "celerity." But there is no provision of law for its publicity. There is not even any executive practice providing for its publicity. It rests in the archives of the Department of the Interior, with copies or orders sent only to the various *land offices*. The innocent prospector, relying

upon existing law, goes upon unappropriated public domain, prospects for mineral, thinks he finds oil, at very great expense sinks a well, and finds oil in paying quantity. He then goes to a land office, perhaps hundreds of miles distant, only to find that the land he has prospected has been withdrawn from entry, and that all his pains and labor are useless, and the money he has expended is lost. He finds himself suddenly the victim of a monarchical exercise of power, without previous notice, and in opposition to what he knows to be the law of the land.

We respectfully submit that the exercise of such executive power cannot be deemed valid in a country governed by laws, which themselves are subject to the Constitution, which is our supreme law.

XII.

The decision and opinion of this court will determine for the future the proper constitutional exercise of governmental functions of greatest importance.

The importance of this cause can hardly be magnified, and yet we do not rest its importance on the same grounds as do counsel for appellant.

From the standpoint of the government, the decision of this court will affect the ownership of various tracts of oil land located by private citizens under existing laws between September 27, 1909, and June 25, 1910. The number of locations made during that period of nine months must cover a very small acreage compared with the total of more than four million acres of oil land withdrawn from entry. If, by private

effort, oil is produced from such located lands, it becomes a part of the common supply for the industries and commerce of the country, and represents no actual loss to the people. (Of course, the question we have before us does not involve any suggestion of fraud in the acquisition of any of such located lands. If there are cases of fraud, such cases will stand and be adjudicated upon their own merits.) The government, as heretofore shown, has already made reservations of all the oil land it needs for naval uses. If, however, in the judgment of executive officers, more land is needed for that purpose (and the additional amount must be very limited), out of the vast unlocated areas there is still an abundance of oil lands which can be so utilized. Under the government's contention, in the light of the withdrawal orders and the documentary history produced before this court, the question merely is whether oil lands may be acquired under the existing law (act of February 11, 1897), or whether their private acquisition shall be delayed until Congress shall change its policy and resort to some leasing system. Whether it is desirable or undesirable that there should be such a change of method of disposition of mineral-oil lands is, of course, not a question before this court. It is a question purely for legislative determination. The discussions at the time of the pendency of the act of June 25, 1910, and the fact that now, more than four years after the withdrawal order of September 27, 1909, Congress has made no change whatever as to the method of private acquisition of oil lands, sufficiently show that Congress does not accept the views of the Executive as to the desirability of an immediate change of governmental policy upon

this subject. And members of the National Congress may well doubt the value of the suggested change of policy in view of past national experiences. During a period constituting nearly half of our national life we had a system of leasing mining lands. That system was found to be a failure, and on this subject we will simply refer to the message of President Polk, sent to Congress December 2, 1845, and to an address of Hon. Abram S. Hewitt before the American Institute of Mining Engineers, both of which are quoted quite fully in 1st Lindley on Mines (2nd edition), sections 33 and 34.

In view of the fact that under the act of June 25, 1910, the President has the power, which he has exercised, of withdrawing the entire public mineral-oil domain (on which vested rights had not then accrued) from the operation of the mining laws, the matter, we submit, is not of great importance to the government as to whether the comparatively few locations made in the period of nine months shall or shall not be invalidated.

But involved in this case there is a principle of vital importance, not only reaching to the administration of the public lands, but extending to the entire domain of statutory law. If, in a case like the present, where the Constitution by express terms vests the control of the public lands exclusively in Congress, the President may, without congressional authority, suspend a "perpetual statute" enacted by Congress for the disposition of mineral lands, and can say that such lands shall not be alienated at all, pending efforts to procure a change of the law, then we can conceive of no case where, upon the same principles, the Presi-

dent may not make a like suspension of laws, in the event that he should feel that the existing law on a given subject is unwise.

If the principle contended for by the government in this case is to be sustained, then to every statute passed by Congress there should be appended the words: "Unless the President shall otherwise direct;" or, if we accept the appellant's concession that Congress does have the power ultimately by new statute to overrule the executive suspension of previous laws, then to every statute we should add the words: "Subject to the right of the President to suspend the operation of this act at his discretion, if he thinks this law should be changed."

Within the last ten years there has been manifested from time to time a strong effort to concentrate more power in the Executive, at the expense, not only of the legislative, but of the judicial, department of our government. The success of appellant's contention in this case would strongly promote such efforts. We submit that the tendency is one which is dangerous to constitutional liberty, is revolutionary in its effect upon our form of government, and its natural course is in the direction of a change of our democracy to a monarchy. Our safety rests on the strict observance of that delimitation of powers and distribution of governmental functions between the three great departments which our Constitution has so wisely established. With due consideration of all progressive tendencies of the day, and of such wholesome changes as a spirit of reform may properly demand, yet, in matters committed by the Constitution to one department of the government and not to an-

other, the line of progress and the declaration of changes of policy should come through that department in which the Constitution has vested the power to change national policies. Our only security as to the *methods* of reaching desired changes is still to walk *super antiquas vias*.

Our discussion has covered a broad field, but it all tends to one point, and that is that the mineral-oil lands of Wyoming, including the lands owned by the appellees, were unlawfully withdrawn from entry by the order of September 27, 1909; and, such being the case, the decree of the District Court in this case should be affirmed.

JOEL F. VAILE,
HENRY McALLISTER, JR.,
WILLIAM N. VAILE,
KARL C. SCHUYLER,
WALTER F. SCHUYLER,
Solicitors for Appellees.

A. M. STEVENSON,
LEE CHAMPION,
Of Counsel.

APPENDIX

Partial list of STATUTES giving discretionary power to the President or head of department to select and appropriate lands for public purposes, or to withdraw lands from entry or sale.

By the act of May 3, 1798, the President of the United States, at his discretion, was authorized to make and complete certain fortifications mentioned—

“and to erect fortifications in any other place or places as the public safety shall require, *in the opinion of the President* of the United States; and which other fortifications he is hereby authorized to cause to be erected, under his direction from time to time as he shall judge necessary.”

1 Stat., 554, 555 (1798).

In like manner we find frequent statutory enactments giving a discretion to the President of the United States for the establishing of fortifications, for locating lighthouses, for setting apart saline lands, which at that time were considered very important to be reserved for the public use, and for setting apart Indian reservations (often pursuant to some Indian treaty). Thus the statutes provide:

“That a lighthouse shall be erected near the entrance of the Chesapeake Bay, at such place, when ceded to the United States in

manner aforesaid, as the President of the United States shall direct."

1 Stat., p. 54 (1789).

"That the President reserve to the United States such lands at and near Fort Washington [in the Northwest territory] as *he may think necessary* for the accommodation of a garrison at that fort."

1 Stat., 252 (1792).

"That for the safe keeping of the military stores, there shall be established under the direction of the President of the United States, three or four arsenals with magazines, as he shall judge most expedient, in such places as will best accommodate the different parts of the United States."

1 Stat., 352 (1794).

"That the President of the United States be, and he is hereby authorized * * * to take, by lease, for a term of years, or by sale in fee, to the United States, one or more suitable place or places where cannon or small arms may be advantageously cast and manufactured, and shall and may there establish foundries and armories for the manufacture of the same."

1 Stat., 555 (1798).

An appropriation was made for the establishment of salt works at the springs near the Wabash River—

“under the direction of the President of the United States, who is hereby authorized to cause the said springs to be worked at the expense of the United States.”

2 Stat., 235 (1803).

In the act for making provision for the disposal of public lands in Indiana Territory, it is provided :

“And the several salt springs in said territory, together with as many contiguous sections to each, as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States.”

2 Stat., 280 (1804).

In the act relating to the adjustment of claims to land in the Territory of New Orleans, in the District of Louisiana, there were excepted from the land subject to sale—

“the salt springs and lands contiguous thereto which by direction of the President of the United States may be reserved for the future disposal of the said states.”

2 Stat., 394 (1806).

In another act it was provided :

“That the several lead mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States

shall be reserved for the future disposal of the United States."

2 Stat., 449 (1807).

Another act made the following provision:

"That the President of the United States is hereby authorized to cause such of the fortifications heretofore built or commenced, as he may deem necessary, to be repaired or completed, and *such other fortifications and works to be erected* as will afford more effectual protection to our ports and harbors."

2 Stat., 453 (1808).

On June 14, 1809, an appropriation was made—

"for erecting such fortifications as may, *in the opinion of the President* of the United States, be deemed necessary for the protection of the northern and western frontiers."

2 Stat., 547 (1809).

In the act for settling claims to land in the Territory of Missouri, special authority was given to the President to reserve such lands as he may "think proper to reserve for military purposes."

2 Stat., 750 (1812).

So, again, authority is given for the reservation of certain public lands to supply timber for naval purposes, and, after providing for the method of selecting the tracts, it is provided:

"The tracts of land thus selected with the approbation of the President, shall be reserved unless otherwise directed by law, from any future sale of the public lands."

3 Stat., 347 (1817).

In the act to set apart certain lands for the encouragement of the cultivation of the vine and olive, provision was made for the entry of certain lands, with the exception of section 16 in each township—

"and with the further exception of such sections, not exceeding ten in number, *as the president shall designate*, for the purpose of laying out and establishing towns thereon."

3 Stat., 375 (1817).

In an act providing for an exchange of lands with the Indians it was provided:

"That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the river Mississippi not included in any state or organized territory, and to which the Indian title has been extinguished, *as he may judge necessary*, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and remove there. * * *

4 Stat., 411, 412 (1830).

In an act relating to the States of Illinois and Missouri, and in the territory north of the State of Illinois, after authorizing entries there were certain reservations, including "such reservations as the President shall deem necessary to retain for military purposes."

4 Stat., 687 (1834).

In relation to public lands in Oregon, and for donations to settlers, it was provided:

"That such portions of the public lands as may be designated under the authority of the President of the United States for forts, magazines, arsenals, dock-yards and other needful *public uses*, shall be reserved and excepted from the operation of this act."

9 Stat., 500 (1850).

Relating to lands in the State of Iowa, the President was authorized to cause certain lands to be sold, with the exception of such "tracts as he may select for military or other purposes."

10 Stat., 27 (1852).

In an act relating to Indian affairs it was enacted:

"That the President of the United States
* * * be and is hereby authorized to make five military reservations from the public domain in the State of California or the territories of Utah and New Mexico, bordering on said state, for Indian purposes."

10 Stat., 238 (1853).

Another enactment provided an appropriation "for the establishment of military posts in the territories of Kansas and Nebraska at such points in said territories as the Secretary of War may designate."

10 Stat., 608 (1855).

In another act relating to the Indians the President was authorized and required to cause to be surveyed the boundaries of lands occupied by certain Indian tribes, and it was further enacted:

"That the President of the United States be and he hereby is authorized and required to set apart the tract or tracts of land aforesaid as a reservation for the confederated bands of Pimas and Maricopas."

11 Stat., 401 (1859).

In an act relating to sale of town sites on public lands it was enacted:

"That it shall be the duty of the President of the United States to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population."

12 Stat., 754 (1863).

In an act relating to certain tribes of Indians, and for disposition of lands in Minnesota and Dakota, the President was directed to set apart for certain

tribes a tract of unoccupied land outside of the limits of any state, sufficient in extent to enable him to assign to each member of said bands eighty acres of good agricultural lands.

12 Stat., 819 (1863).

In an act relating to the Indians in California it was provided :

“That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations.”

13 Stat., 40 (1864).

These various statutes commit to the President or to the head of a department the discretion of making the reservation referred to, and generally the place where the reservation is to be made, as if Congress had made a statutory reservation of the specific tract selected by the President—a principle which is illustrated by the language used in *Wilcox vs. Jackson*, *supra* :

“It would not be doubted, we suppose, by any one, that if Congress had by law directed the trading house to be established and the military post erected, at Fort Dearborn, by name, that this would have been by authority of law. But instead of designating the place themselves they left it to the discretion of the President, which is precisely the same thing in effect.”

In 1888 Congress provided for investigation of the arid region, and for selection of sites for reservoirs by the Geological Survey under the direction of the Secretary of the Interior, and enacted:

"And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals, etc. * * * are from this time henceforth hereby reserved from sale as the property of the United States."

25 Stat., 526, 527.

In 1891 Congress provided:

"That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

26 Stat., 1103.

In 1897, referring to the power theretofore given to the President, Congress enacted:

"The President is hereby authorized at any time to modify any executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the

boundary lines of such reserve, or may vacate altogether any order creating such reserve."

30 Stat., 36.

In the Reclamation Act of June 17, 1902, the Secretary of the Interior was directed to—

"withdraw from public entry lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act."

32 Stat., 388.

Even where a temporary withdrawal was to be made, Congress seems to have deemed it necessary to give authority, and, referring to the Carey act, Congress says:

"It shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw *temporarily* from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory."

And Congress is careful then to make such withdrawal temporary by the following proviso:

"Provided, that if the State or Territory shall not present its application for segregation and maps and plats within *one year* after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made."

36 Stat., 237 (March 15, 1910).

In the act of June 25, 1910, Congress expresses disapproval of executive withdrawals for the purpose of increasing forest reserves, or making new ones, under authority theretofore given for that purpose, for in the act mentioned we have the following clause:

"That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado or Wyoming, *except by act of Congress.*"

36 Stat., 847, 848.

SECOND APPENDIX

(See Argument, pp. 28-29, *supra*.)

The oil lands in Wyoming were first withdrawn from *agricultural* entry by the Commissioner of the General Land Office on the 10th of November, 1900, and long before any suggestion was made of reserving oil lands for naval purposes. On that date he wrote to the Register and Receiver at Douglas, Wyoming, as follows:

“Register and Receiver,
Douglas, Wyoming.

Sirs:

I am in receipt of a letter dated Oct. 27th, 1900, from P. M. Shannon, inclosing a petition for the suspension from disposal under the agricultural laws of lands in Townships 38 to 43 N. Range 77 to 80 W., Wyoming.

The petitioners allege a personal knowledge of the lands and believe them to be more valuable for their oil deposits than for any other purpose.

The suspension of the lands from entry is desired, that their character may be investigated and *the mineral lands preserved to the miner and prospector*.

Sufficient reasons therefor being shown, all the public lands in the above townships are hereby temporarily suspended from disposal under the *agricultural* laws. A special

agent will be detailed by this office to make an examination of said lands. Make the proper notations on your records.

This suspension will not interfere with any entries allowed for said lands or with contests involving the same, but you will issue no final certificates upon entries allowed until further instructions.

Very respectfully,

BINGER HERMANN, Commissioner."

It was subsequently discovered that some of the lands intended to be so withdrawn were in the Buffalo land district. The following letter was then sent to the Register and Receiver of that office:

"Nov. 21, 1900.

Register and Receiver,
Buffalo, Wyoming.

Sirs:

Office letter of November 10, 1900, to the Register and Receiver, Douglas, Wyoming, suspended from agricultural entry, pending an investigation of their alleged oil character, lands in townships 38 to 43 N., ranges 77 to 80 W. I find that of said lands, Twns. 41 to 43 N rs. 77 to 80 fall within the limits of your district. You will make the proper notations on your records.

As stated in said office letter, said suspension will not interfere with any entries allowed for said lands or with entries involving the same, but will prevent the issuance of

final certificates upon such entries until further instructions.

Respectfully,

BINGER HERMANN, Commissioner."

The lands were examined by special agents, and on September 27, 1901, a letter was written to the Register and Receiver at Douglas, Wyoming, which, after reciting the history of the withdrawal, concludes:

"The reports of the agents and the evidence accompanying the same have been carefully examined and without going into the matter in detail it would appear sufficient to say that the following townships appear to contain oil in paying quantities, or such evidences of the existence of oil as would justify the suspension of the same from present disposition under the *agricultural* land laws that opportunity may be given to develop the same as *mineral*, viz.:

Twp.	R.
31 N	81 W.
32 N	81, 82, 83, 86 W.
33 N	81, 82, 83, 85, 87, 88, 89, 90 W.
34 N	87, 88, 89, 90 W.
38 N	77, 78, 79 and 80 W.
39 N	77, 78, 79 and 80 W.
40 N	77, 78, 79, 80 and 81 W.
41 N	77, 78, 79, 80, 81 and 82 W.
42 N	77, 78, 79, 81, 82 W.

The townships above described are accordingly hereby suspended from *agricul-*

tural entry. The suspension of township No. 42 N, ranges 77 to 80 W. is revoked.

* * * * *

Very respectfully,

W. A. RICHARDS, Assistant Commissioner."

The situation was unchanged until April 1, 1903, when the following letter was sent to the Register and Receiver at Douglas, Wyoming:

"April 1st, 1903.

Register and Receiver,
Douglas, Wyoming.

Sirs:

By office letter of September 27th, 1901, addressed to you, certain lands in your district and in the Buffalo, Wy. land district, were suspended from present disposition under the agricultural land laws, *that opportunity might be given to develop the same as mineral*, it appearing that said lands contain oil in paying quantities or such evidences of the existence of oil as would justify the action taken.

The lands so suspended are described as follows:

[Description same as in letter of September 27, 1901.]

It would appear that ample opportunity has been afforded mineral claimants to explore and develop the land in question and that the public interests would be promoted by the removal of the order of suspension from such lands as now appear to be non-

mineral in character. Accordingly the suspension of September 27th, 1901 is revoked except as to the following described lands :

Secs. 25-56 inclusive of T. 42 N. R. 78 W.

Secs. 25 to 36 inclusive of T. 42 N. R. 79 W.

All of Twps. 41 N. Ranges 78 and 79 W.

All of Twps. 40 N. Ranges 78 and 79 W.

Sections 1, 12, 13, 24, 25, 36, Twp. 40 N. R. 80 W.

All townships 39 N. Ranges 78 and 79 W.

Secs. 1, 2, 11, 12, 13, 14, 23, 25, 26, 35 and 36 T. 39 N.

Secs. 1 to 6 inclusive T. 38 N. R. 78 W.

Sections 1 to 6 inclusive, T. 38 N. R. 79 W.

Sections 1 and 2 inclusive T. 38 N. R. 80 W.

You will note the action on your records.

Respectfully,

W. A. RICHARDS, Commissioner."

Apparently no further official action was taken until in July, 1909, when the following letter was written to the Secretary of the Interior by the Acting Commissioner of the General Land Office :

"July 23, 1909.

The Honorable Secretary of the Interior.

Sir :

I have the honor to submit herewith a report with accompanying diagrams, by Mineral Inspector Thos. S. Harrison, and approved by Chief of Field Division, of an ex-

amination of certain townships in Wyoming, which were withdrawn from agricultural entry by office letters N. of April 1, 1903, to the local offices at Douglas and Buffalo, Wyoming, *in order that parties might have opportunity to develop the land for alleged oil deposits.*

The lands included in said withdrawal are described as follows:

[Description as per letter of April 1, 1903.]

In view of the report of Mineral Inspector Harrison, it is recommended that the suspension be continued pending examination and classification as to the mineral (oil) character of the lands by the U. S. Geological Survey.

Very respectfully,

S. V. PROUDFIT, Acting Commissioner."

"Approved *July 26, 1909.*

FRANK PIERCE,

Acting Secretary."



236 U. S.

Syllabus.

UNITED STATES *v.* MIDWEST OIL COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

No. 278. Argued January 9, 12, 1914; restored to docket April 20, 1914;
reargued May 7, 1914.—Decided February 23, 1915.

Prior to initiation of some right given by law, the citizen has no enforceable interest in the public statutes and no private right in land which is the property of the people.

The practice of the withdrawal of public lands, both mineral and non-mineral, from private acquisition by the President without special authorization from Congress, after Congress has opened them to occupation, dates from an early period in the history of the Government, and the power so exercised has never been repudiated by Congress although it has always been subject to disaffirmance thereby. The Land Department charged with the administration of the public domain has constantly asserted the power of the Executive to withdraw lands opened for occupation so long as they remain unappropriated.

Government is a practical affair intended for practical men, and the rule that long acquiescence in a governmental practice raises a presumption of authority applies to the practice of executive withdrawals by the Executive of lands opened by Congress for occupation. While the Executive cannot by his course of action create a power, a long continued practice to withdraw lands from occupation after they have been opened by Congress, known to and acquiesced in by Congress, does raise a presumption that such power is exercised in pursuance of the consent of Congress or of a recognized administrative power of the Executive in the management of the public lands.

Laws and rules for the disposal of public lands are necessarily general in their nature, and Congress may by implication grant a power to the Executive to administer the public domain.

The power of Congress over the public domain is not only that of a legislative domain but also that of a proprietor, and it may deal with it as an individual owner may deal with his property and may grant powers to the Executive as an owner might grant powers to an agent, either expressly or by implication.

There is no distinction in principle between the power of the Executive

to make reservation of portions of the public domain and the power to withdraw them from occupation.

The validity of withdrawal orders made by the President in aid of future legislation has heretofore been expressly recognized by this court. *Bullard v. Des Moines R. R.*, 122 U. S. 170.

No action which Congress may have taken in any particular case can be construed as a denial of powers of the Executive to make temporary withdrawals of public land in the public interest, and the orders made and remaining in force are proof of congressional recognition of that power.

Silence of Congress after consideration of a practice by the Executive may be equivalent to acquiescence and consent that the practice be continued until the power exercised be revoked.

Nothing in the act of June 25, 1910, 36 Stat. 847, authorizing the President to withdraw lands and requiring lists of the same to be filed with Congress, can be construed as repudiating withdrawals already made.

Congress did not, by the act of June 25, 1910, take any rights from locators who had initiated rights prior to the withdrawal order of September 27, 1909, nor did it validate any location made after that date.

Quare whether, as an original question raised before any practice had been established, the President can withdraw from private acquisition land which Congress had made free and open to occupation and purchase. This case has been determined on other grounds and in the light of long continued practice.

THE facts, which involve the power of the President of the United States to withdraw public lands from entry under Rev. Stat., §§ 2319, 2329, and the act of February 11, 1897, and the effect of the withdrawal order No. 5 contained in the Proclamation of President Taft of September 27, 1909, are stated in the opinion.

Mr. Assistant Attorney General Knaebel and The Solicitor General for the United States.

Mr. Joel F. Vaile, with whom Mr. Henry McAllister, Jr., Mr. William N. Vaile, Mr. Karl C. Schuyler, Mr. Walter F. Schuyler, Mr. A. M. Stevenson and Mr. Lee Champion were on the brief, for the Midwest Oil Company et al.:

The withdrawal order of September 27, 1909, was not an appropriation of specific lands for naval, or other public use, but was avowedly for the purpose of preventing acquisition of public oil lands by qualified citizens under existing statutes, pending efforts to obtain a change of law. This was beyond the power of the President. *Kendall v. United States*, 12 Pet. 524, 612; *Marbury v. Madison*, 1 Cr. 137, 166; *United States v. Nicoll*, 1 Paine, 464; *Ex parte Merryman*, 17 Fed. Cas. No. 9487; *Deffebach v. Hawke*, 115 U. S. 392, 406; *Shaw v. Kellogg*, 170 U. S. 312.

The Executive cannot limit the rights given to the public lands by Congress. *United States v. United Verde Copper Co.*, 196 U. S. 207; *Morrill v. Jones*, 106 U. S. 466; *United States v. Eaton*, 144 U. S. 677; *Williamson v. United States*, 207 U. S. 425, 462; *United States v. George*, 228 U. S. 14.

The executive power is dependent on congressional authority. *United States v. Gratiot*, 14 Pet. 526, 536, 537; *United States v. Fitzgerald*, 15 Pet. 407, 421; *Van Brocklin v. Tennessee*, 117 U. S. 151, 168; *Wisconsin R. R. v. Price County*, 133 U. S. 496, 504; *Gibson v. Chouteau*, 13 Wall. 92, 99.

Except for certain doctrines first announced during the administration of President Roosevelt, the view of executive officers has been that the power to withdraw public lands from the operation of existing laws depended upon some authority of Congress. *Nor. Pac. R. R. v. Davis*, 19 L. D. 87, 88; *Atlantic & Pacific R. R.*, 6 L. D. 84, 87, 88.

President Taft himself doubted his authority when he said in his special message of January 14, 1910, that the power to withdraw from the operation of existing statutes, lands the disposition of which would be detrimental to the public interests was not clear and satisfactory; that unfortunately Congress had not fully acted on the recommendations of the executive; that the question as to what the executive should do was full of dif-

ficulty; and that he thought it the duty of Congress by statute to validate withdrawals made by the Secretary of Interior and the President, and to authorize the Secretary temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions of emergencies as they arise.

The Executive does not possess the power to withdraw public lands from the operative effect of existing laws, without the authority of some law of Congress which, by direct expression or by necessary implication, shall give such power of withdrawal. *Hewitt v. Schultz*, 180 U. S. 139; *Southern Pacific R. R. v. Bell*, 183 U. S. 675, 685, 686; *Brandon v. Ard*, 211 U. S. 11, 21; *Wolsey v. Chapman*, 101 U. S. 755, 769; *Lockhart v. Johnson*, 181 U. S. 516, 520; *Leecy v. United States*, 190 Fed. Rep. 289; *Nelson v. Nor. Pac. R. R.*, 188 U. S. 108, 133; *Sjoli v. Dreschel*, 199 U. S. 564, 566; *Osborn v. Froyseth*, 216 U. S. 571, 574; *Hoyt v. Weyerhaeuser*, 161 Fed. Rep. 324; *Weyerhaeuser v. Hoyt*, 219 U. S. 380.

Although especially urged by the Government the Des Moines river cases do not militate against the contention of appellees. *Bullard v. Des Moines R. R.*, 122 U. S. 167; *Dubuque & Pacific Ry. v. Litchfield*, 23 How. 66; *Wolcott v. Des Moines Co.*, 5 Wall. 681, 688, 689; *Williams v. Baker*, 17 Wall. 144, 147; *Wolsey v. Chapman*, 101 U. S. 755, 769; 5 Stat. 456; 9 Stat. 77; 11 Stat. 10.

The authority of the President to make the withdrawal of lands now under consideration is not sustained by the fact that he has the power to make reservations for military purposes and for Indian reservations. *Wilcox v. Jackson*, 13 Pet. 496; *McConnell v. Wilcox*, 1 Scam. 344; *Grisar v. McDowell*, 6 Wall. 363; *United States v. Tichenor*, 12 Fed. Rep. 415, 423; *Florida Imp. Co. v. Bigalsky*, 44 Florida, 771; 17 Ops. Atty. Genl. 160, 163; 17 Ops. Atty. Genl. 258, 260; *United States v. Payne*, 8 Fed. Rep. 883,

236 U. S. Argument for the Midwest Oil Co.

888; *Gibson v. Anderson*, 131 Fed. Rep. 39, 41, can all be distinguished.

The expression "public uses" involved in those cases, refers to governmental uses rendered necessary for the proper discharge of the functions committed to the executive branch of the Government in its various departments. It does not apply to any broad exercise of power, independent of an immediately intended governmental use. *Covington v. Kentucky*, 173 U. S. 231, 242; *Williams v. Lash*, 8 Gilfillan (Minn.), 496; *Orr v. Quimby*, 54 N. H. 590; *United States v. Leathers*, 6 Sawyer, 17; *United States v. Martin*, 14 Fed. Rep. 817; *McFadden v. Mountain View M. & M. Co.*, 97 Fed. Rep. 670; *United States v. Grand Rapids and Ind. Ry.*, 154 Fed. Rep. 131; *In re Wilson*, 140 U. S. 575; *Spalding v. Chandler*, 160 U. S. 394.

The President's power to reserve public lands for public uses finds its sanction in acts of Congress. Even where no specific statute directly authorizes the executive act, it nevertheless derives its authority from an assumed grant by Congress, manifested by frequent enactments of statutes giving like authority in like cases. Its extent is limited to the setting apart of particular tracts of land for public uses, as the exigencies of the public service may require.

The words contained in certain acts providing for agricultural entries or making grants of land, which except therefrom lands reserved "by proclamation of the President," or "by order of the President," or "by competent authority," will not sustain an order which withdraws the public mineral domain from the operation of existing statutes. *Grisar v. McDowell*, 6 Wall. 381; *Black on Interpretation of Laws*, p. 191; *The Paulina's Cargo*, 7 Cranch, 52, 60; *Cantwell v. Owens*, 14 Maryland, 215, 226; *Rich v. Keyser*, 54 Pa. St. 86, 89; *Dickenson v. Fletcher*, L. R. 9 C. P. 1, 8; *Edrich's Case*, 5 Rep. 118, 77 English Rep. 238; *Moser v. Newman*, 6 Bingham, 556, 130 English Rep. 1395; *Johnson v. United States*, 225

U. S. 405, 415, 416; *United States v. Perry*, 50 Fed. Rep. 743, 748; 1 C. C. A. 648.

Prior to June 25, 1910, neither the President nor the Secretary of the Interior had any power to withdraw public mineral-oil lands from location or entry under the existing mining laws.

Prior to 1866 Congress itself had reserved all mineral lands from sale, and this congressional reservation left no opportunity during that period for and withdrawal of mineral lands by executive authority. *United States v. Gratiot*, 14 Pet. 526; *United States v. Gear*, 3 How. 120; *Deffeback v. Hawke*, 115 U. S. 392, 400; Barringer & Adams on the Law of Mines and Mining, page 194; Curtis H. Lindley on Mines, § 47, 2d ed.; *Newhall v. Sanger*, 92 U. S. 761, 763.

Since July, 1866, the mining laws have contained complete and exclusive provisions as to the control and disposition of public mineral lands.

The act of February 11, 1897, must, therefore, continue to be the law until repealed by some other act of Congress, or by the enactment of some other law which has the effect of repealing it. There has been no such repeal, and no repugnant law has been enacted. *United States v. Gear*, 3 How. 120, 131; *McConnell v. Wilcox*, *supra*; *Fort Boise Hay Reservation*, 6 L. D. 16, 18; *Kendall v. United States*, *supra*; *Cotting v. Kansas &c. Co.*, 183 U. S. 79, 84; *Marbury v. Madison*, 1 Cranch, 166; *The Floyd Acceptances*, 7 Wall. 666, 676, 677.

There has been no long-continued practice or customary usage to support the withdrawal of mineral lands from the operation of existing laws, although some appropriations of land for military reservations, or some setting apart of specific lands for occupancy by the Indians, may have contained mineral deposits. *Gibson v. Anderson*, 131 Fed. Rep. 39; *Behrends v. Goldsteen*, 1 Alaska, 518, 524.

There has, however, never been a practice and never

236 U. S.

Counsel for amici curiæ.

been a usage on the part of executive officers of withdrawing public mineral lands from location or entry under existing laws.

To withdraw large tracts of the public mineral domain from the operation of the acts of May 10, 1872, and of February 11, 1897, was to suspend the operation of those laws. To so suspend the operation of laws is legislation—not regulation.

The act of June 25, 1910, did not validate any previous withdrawal, it did not authorize the ratification or confirmation of any such previous withdrawal, and the withdrawal order of July 2, 1910, did not affect any rights previously acquired under existing mining laws.

This enactment speaks only *in futuro*. It is not in any respect retroactive. *Murray v. Gibson*, 15 How. 420, 423; *McEwen v. Lessee*, 24 How. 242, 244; *Harvey v. Tyler*, 2 Wall. 328, 347; *Sohn v. Waterson*, 17 Wall. 596, 599; *Twenty Per Cent Cases*, 20 Wall. 179, 187; *Chew Heong v. United States*, 112 U. S. 536, 559.

The attempted ratification of previous withdrawals contained in the order of July 2, 1910, is void.

Prior to the approval of the act of June 25, 1910, appellees' grantors had acquired vested rights in the property in controversy, and on June 25, 1910, these rights could not be affected even by act of Congress, much less by an executive order. *Belk v. Meagher*, 104 U. S. 279, 283; *Gwillim v. Donnellan*, 115 U. S. 45, 49; *Noyes v. Mantle*, 127 U. S. 348, 353; *Manuel v. Wulff*, 152 U. S. 505, 510, 511; 1 Lindley on Mines, §§ 169, 539; 1 Snyder on Mines, §§ 451, 466; 25 Land Decisions, 48, 51.

The decision and opinion of this court will determine for the future the proper constitutional exercise of governmental functions of greatest importance.

By leave of court, *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. Francis W. Clements*,

Mr. Frederic R. Kellogg, Mr. E. S. Pillsbury and Mr. Oscar Sutro filed briefs as *amici curiæ*.

By leave of court, *Mr. Frank H. Short* filed a brief as *amicus curiæ*.

MR. JUSTICE LAMAR delivered the opinion of the court.

All public lands containing petroleum or other mineral oils and chiefly valuable therefor, have been declared by Congress to be "free and open to occupation, exploration and purchase by citizens of the United States . . . under regulations prescribed by law." Act of February 11, 1897, c. 216, 29 Stat. 526; R. S. 2319, 2329.

As these regulations permitted exploration and location without the payment of any sum, and as title could be obtained for a merely nominal amount, many persons availed themselves of the provisions of the statute. Large areas in California were explored; and petroleum having been found, locations were made, not only by the discoverer but by others on adjoining land. And, as the flow through the well on one lot might exhaust the oil under the adjacent land, the interest of each operator was to extract the oil as soon as possible so as to share what would otherwise be taken by the owners of nearby wells.

The result was that oil was so rapidly extracted that on September 17, 1909, the Director of the Geological Survey made a report to the Secretary of the Interior which, with enclosures, called attention to the fact that, while there was a limited supply of coal on the Pacific coast and the value of oil as a fuel had been fully demonstrated, yet at the rate at which oil lands in California were being patented by private parties it would "be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the

Government will be obliged to repurchase the very oil that it has practically given away. . . ." "In view of the increasing use of fuel by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government's own use . . ." and "pending the enactment of adequate legislation on this subject, the filing of claims to oil lands in the State of California should be suspended."

This recommendation was approved by the Secretary of the Interior. Shortly afterwards he brought the matter to the attention of the President who, on September 27, 1909, issued the following Proclamation:

"Temporary Petroleum Withdrawal No. 5."

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination." The list attached described an area aggregating 3,041,000 acres in California and Wyoming—though, of course, the order only applied to the public lands therein, the acreage of which is not shown.

On March 27, 1910, six months after the publication of the Proclamation, William T. Henshaw and others entered upon a quarter section of this public land in Wyoming so withdrawn. They made explorations, bored a well, discovered oil and thereafter assigned their interest to the Appellees, who took possession and extracted large quantities of oil. On May 4, 1910, they filed a location certificate.

As the explorations by the original claimants, and the

subsequent operation of the well, were both long after the date of the President's Proclamation, the Government filed, in the District Court of the United States for the District of Wyoming, a Bill in Equity against the Midwest Oil Company and the other Appellees, seeking to recover the land and to obtain an accounting for 50,000 barrels of oil alleged to have been illegally extracted. The court sustained the defendant's demurrer and dismissed the bill. Thereupon the Government took the case to the Circuit Court of Appeals of the Eighth Circuit which rendered no decision but certified certain questions to this court, where an order was subsequently passed directing the entire record to be sent up for consideration.

The case has twice been fully argued. Both parties, as well as other persons interested in oil lands similarly affected, have submitted lengthy and elaborate briefs on the single and controlling question as to the validity of the Withdrawal Order. On the part of the Government it is urged that the President, as Commander-in-Chief of the Army and Navy, had power to make the order for the purpose of retaining and preserving a source of supply of fuel for the Navy, instead of allowing the oil land to be taken up for a nominal sum, the Government being then obliged to purchase at a great cost what it had previously owned. It is argued that the President, charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution (Art. 2, § 1), and also in conformity with the tacit consent of Congress, withdraw, in the public interest, any public land from entry or location by private parties.

The Appellees, on the other hand, insist that there is no dispensing power in the Executive and that he could not suspend a statute or withdraw from entry or location any land which Congress had affirmatively declared should be free and open to acquisition by citizens of the United States. They further insist that the withdrawal

order is absolutely void since it appears on its face to be a mere attempt to suspend a statute—supposed to be unwise,—in order to allow Congress to pass another more in accordance with what the Executive thought to be in the public interest.

1. We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that "the practice dates from an early period in the history of the government." *Grisar v. McDowell*, 6 Wall. 381. Scores and hundreds of these orders have been made; and treating them as they must be (*Wolsey v. Chapman*, 101 U. S. 769), as the act of the President, an examination of official publications will show that (excluding those made by virtue of special congressional action, *Donnelly v. United States*, 228 U. S. 255) he has during the past 80 years, without express statutory authority—but under the claim of power so to do—made a multitude of Executive Orders which operated to withdraw public land that would otherwise have been open to private acquisition. They affected every kind of land—mineral and nonmineral. The size of the tracts varied from a few square rods to many square miles and the amount withdrawn has aggregated millions of acres. The number of such instances cannot, of course, be accurately given, but the extent of the practice can best be appreciated by a consideration of what is believed

to be a correct enumeration of such Executive Orders mentioned in public documents.¹

They show that prior to the year 1910 there had been issued

99 Executive Orders establishing or enlarging Indian Reservations;

109 Executive Orders establishing or enlarging Military Reservations and setting apart land for water, timber, fuel, hay, signal stations, target ranges and rights of way for use in connection with Military Reservations;

44 Executive Orders establishing Bird Reserves.

In the sense that these lands may have been intended for public use, they were reserved for a public purpose. But they were not reserved in pursuance of law or by virtue of any general or special statutory authority. For, it is to be specially noted that there was no act of Congress providing for Bird Reserves or for these Indian Reservations. There was no law for the establishment of these

¹ Departmental Ruling as to the existence of the power.

Report, Commissioner of the Land Office, February 28, 1902, p. 3. 17 Senate Doc. 57th Cong.

Appendix to Call's "Military Reservations," 495.

Decisions of Department of the Interior relating to Public Lands. 702, 31, 552; 13 *Id.* 426, 607, 628; 1 L. D. 553; 29 *Id.* 33; 31 *Id.* 195; 34 *Id.* 145; 6 *Id.* 317.

Indian Reservations:

"Executive Orders relating to Indian Reservations" (1912).
Public Domain, 243.

Report of Commissioner of Indian Affairs, 70-87 (1913).

Military Reservations:

Public Domain, 247.

14 House Doc. 217 (1898-99).

18 House Doc. 387 (1905-6).

Call's "Military Reservations" (1910).

Bird Reservations:

42 House Doc. 93 (1908).

43 House Doc. 44 (1909).

Military Reservations or defining their size or location. There was no statute empowering the President to withdraw any of these lands from settlement or to reserve them for any of the purposes indicated.

But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For prior to the initiation of some right given by law the citizen had no enforceable interest in the public statute and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary it uniformly and repeatedly acquiesced in the practice and, as shown by these records, there had been, prior to 1910, at least 252 Executive Orders making reservations for useful, though non-statutory purposes.

This right of the President to make reservations,—and thus withdraw land from private acquisition,—was expressly recognized in *Grisar v. McDowell*, 6 Wall. 364 (9), 381, where (1867) it was said that “from an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.”

But notwithstanding this decision and the continuity of this practice, the absence of express statutory authority was the occasion of doubt being expressed as to the power

of the President to make these orders. The matter was therefore several times referred to the law officers of the Government for an opinion on the subject. One of them stated (1889) (19 Op. 370) that the validity of such orders rested on "a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, portions of the public domain." Another reported that "the power of the President was recognized by Congress and that such recognition was equivalent to a grant" (17 Op. 163) (1881). Again, when the claim was made that the power to withdraw did not extend to mineral land, the Attorney General gave the opinion that the power "must be regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated." (17 Op. 232) (1881).

Similar views were expressed by officers in the Land Department. Indeed, one of the strongest assertions of the existence of the power is the frequently quoted statement of Secretary Teller made in 1881:

"That the power resides in the Executive from an early period in the history of the country to make reservations has never been denied either legislatively or judicially, but on the contrary has been recognized. It constitutes in fact a part of the Land Office law, exists *ex necessitati rei*, is indispensable to the public weal and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled ever to be disputed." 1 L. D., 338 (1881-3.)

2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so

often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

This principle, recognized in every jurisdiction, was first applied by this court in the often cited case of *Stuart v. Laird*, 1 Cranch, 299, 309. There, answering the objection that the act of 1789 was unconstitutional in so far as it gave Circuit powers to Judges of the Supreme Court, it was said (1803) that, "practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

Again, in *McPherson v. Blacker*, 146 U. S. 1 (4), where the question was as to the validity of a state law providing for the appointment of Presidential electors, it was held that, if the terms of the provision of the Constitution of the United States left the question of the power in doubt, the "contemporaneous and continuous subsequent practical construction would be treated as decisive" (36). *Fairbank v. United States*, 181 U. S. 307; *Cooley v. Board of Wardens*, 12 How. 315; *The Laura*, 114 U. S. 415. See also *Grisar v. McDowell*, 6 Wall. 364, 381, where, in 1867, the practice of the Executive Department was referred to as evidence of the validity of these orders making reservations of public land, even when the practice was by no means so general and extensive as it has since become.

3. These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a Rail Road more than had been authorized by Congress in the land grant act. *Southern Pacific v. Bell*, 183 U. S.

685; *Brandon v. Ard*, 211 U. S. 21. Nor do these decisions mean that the Executive can by his course of action create a power. But they do clearly indicate that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands. This is particularly true in view of the fact that the land is property of the United States and that the land laws are not of a legislative character in the highest sense of the term (Art. 4, § 3) "but savor somewhat of mere rules prescribed by an owner of property for its disposal." *Butte City Water Co. v. Baker*, 196 U. S. 126.

These rules or laws for the disposal of public land are necessarily general in their nature. Emergencies may occur, or conditions may so change as to require that the agent in charge should, in the public interest, withhold the land from sale; and while no such express authority has been granted, there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. The power of the Executive, as agent in charge, to retain that property from sale need not necessarily be expressed in writing. *Lockhart v. Johnson*, 181 U. S. 520; *Bronson v. Chappell*, 12 Wall. 686; *Campbell v. City of Kenosha*, 5 Wall. 194 (2).

For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress "may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale." *Camfield v. United States*, 167 U. S. 524; *Light v. United States*, 220 U. S. 536. Like any other owner it may provide when, how and to whom its land can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights,

as it did when the valuable privilege of grazing cattle on this public land was held to be based upon an "implied license growing out of the custom of nearly a hundred years." *Buford v. Houtz*, 133 U. S. 326. So too, in the early days the "Government, by its silent acquiescence, assented to the general occupation of the public lands for mining." *Atchison v. Peterson*, 20 Wall. 512. If private persons could acquire a privilege in public land by virtue of an implied congressional consent, then for a much stronger reason, an implied grant of power to preserve the public interest would arise out of like congressional acquiescence.

The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time and affecting vast bodies of land, in many States and Territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public but did not interfere with any vested right of the citizen.

4. The appellees, however, argue that the practice thus approved, related to Reservations—to cases where the land had been reserved for military or other special public purposes—and they contend that even if the President could reserve land for a public purpose or for naval uses, it does not follow that he can withdraw land in aid of legislation.

When analyzed, this proposition, in effect, seeks to make a distinction between a Reservation and a Withdrawal—between a Reservation for a purpose, not provided for by existing legislation, and a Withdrawal made in aid of future legislation. It would mean that a Permanent Reservation for a purpose designated by the President, but not provided for by a statute, would be valid, while a merely Temporary Withdrawal to enable Congress to

legislate in the public interest would be invalid. It is only necessary to point out that, as the greater includes the less, the power to make permanent reservations includes power to make temporary withdrawals. For there is no distinction in principle between the two. The character of the power exerted is the same in both cases. In both, the order is made to serve the public interest and in both the effect on the intending settler or miner is the same.

But the question need not be left solely to inference, since the validity of withdrawal orders, in aid of legislation, has been expressly recognized in a series of cases involving a number of such orders, made between 1850 and 1862. *Dubuque & Pac. R. R. v. Litchfield*, 23 How. 66; *Wolcott v. Des Moines Co.*, 5 Wall. 681; *Wolsey v. Chapman*, 101 U. S. 755; *Litchfield v. Webster County*, 101 U. S. 773; *Bullard v. Des Moines &c. R. R.*, 122 U. S. 167.

It appears from these decisions, and others cited therein, that in 1846 Congress made to the Territory of Iowa, a grant of land on both sides of the Des Moines, for the purpose of improving the navigation from the mouth of the river to Raccoon Fork, 5 Wall. 681. There was from the outset a difference of opinion as to whether the grant extended throughout the entire course of the river or was limited to the land opposite that portion of the stream which was to be improved. In *Dubuque & Pac. R. R. v. Litchfield*, 23 How. 66, decided in 1861, it was held that the grant only included the land between the mouth of the river and Raccoon Fork. But for eleven years prior to that decision there had been various and conflicting rulings by the Land Department. It was first held that the grant included land *abore* the Fork and certificates were issued to the Territory as the work progressed. That ruling was shortly followed by another that the grant extended only *up to* the Fork.

"On April 6, 1850, Secretary Ewing, while concurring with Attorney General Crittenden in his opinion that the

grant of 1846 did not extend above the Raccoon Fork, issued an order withholding all the land then in controversy from market until the close of the then session of Congress, which order has been continued ever since," (we italicize) "*in order to give the State the opportunity of petitioning for an extension of the grant by Congress.*" *Bullard v. Des Moines R. R.*, 122 U. S. 170.

The withdrawal was made in 1851. The hoped-for legislation was not passed until several years later. Between those dates various private citizens made settlements by which, under various statutes they initiated rights and acquired an interest in the land—if the withdrawal order was void. But by such settlements they obtained no rights if the withdrawal order was valid. A subsequent ratification could have related back to 1851, but if the withdrawal was originally void, the ratification of course, could not cut out intervening rights of settlers. *Cook v. Tullis*, 18 Wall. 338.

There was litigation between settlers claiming, as here, under existing land laws, and those whose title depended upon the original validity of the *withdrawals made in aid of legislation*. (*Riley v. Welles*, 154 U. S. 578; *Bullard v. Des Moines R. R.*, 122 U. S. 173; *Wolcott v. Des Moines*, 5 Wall. 681.) In those suits, the withdrawal orders were not treated as having derived their validity from the legislation subsequently passed in aid of Iowa and its assignees, but they were treated as having been effective from their dates, regardless of the fact that the land included therein had not originally been granted to Iowa. In one of them it was said that:

"This Court has decided in a number of cases, in regard to these lands, that this withdrawal operated to exclude from sale, purchase, or preëmption all the lands in controversy. . . ." *Bullard v. Des Moines R. R.*, 122 U. S. 170.

5. Beginning in 1850 with this order of Secretary

Ewing, in aid of legislation on behalf of Iowa, and its continuance even after this Court had decided that no land above the Fork passed to the Territory (23 How. 66), the practice of making withdrawals continued down to 1910. The reasons for making the withdrawal orders varied but the power exerted was the same and was supported by the same implied consent of Congress.

For, if any distinction can be drawn between the principle decided in the *Iowa* cases and this; or if the power involved in making a Reservation could differ from that exercised in making a Withdrawal—then the Executive practice and congressional acquiescence, which operated as a grant of an implied power to make Permanent Reservations, are also present to operate as a grant of an implied power to make Temporary Withdrawals. It may be well to refer to some of the public records showing the existence and extent of the practice.

Withdrawals in aid of legislation were made in particular cases (26 L. D. 347; 28 L. D. 361; 35 L. D. 11), and many others more general in their nature and much more extensive in their operation.

For example: The Land Department passed an order suspending the location and settlement of certain islands and all isolated tracts containing less than 40 acres "with a view to submitting to Congress" the question as to whether legislation on the subject was not needed. 34 L. D. 245.

Reports to the 56th and 57th Congresses (26 Sen. Doc. 87; 22 House Doc. 108, 445) contained a list of "Temporary Withdrawals" made to prevent the disposal of land pending the consideration of the question of the advisability of setting the same apart as forest reservations."

Phosphate land was "temporarily withdrawn, pending action by Congress." House Doc. 43, 10, 61st Cong., 2d Sess.

There were also temporary withdrawals of oil land from

236 U. S.

Opinion of the Court.

agricultural entry, in aid of subsequent legislation. 26 Sen. Doc. 75; 43 House Doc. 8, 9, 10, 13 (61st Cong.).

In pursuance of a like practice and power, public land containing coal was withdrawn "pending the enactment of new legislation" 35 L. D. 395; 43 H. Doc. 8, 13. In the Message of the President to the 2d session of the 59th Congress attention was called to the withdrawal of coal lands in aid of legislation. There was no repudiation of the order or of the practice either at that session or at any succeeding session of Congress. It was claimed in the argument that the act of 1908 (35 Stat. 424) was the legislation contemplated by the Executive when coal lands were temporarily withdrawn by the order of 1906; and reference has already been made to the act of 1861 concerning the Iowa lands withdrawn in 1849. There were other instances in which there was congressional action at a more or less remote period after the order of temporary withdrawal. The land for the Wind Cave Park was withdrawn in 1900 and the Park was established in 1903 (32 Stat. 765); Bird Reserves were established in 1903 and, in 1906 (34 Stat. 536), an act was passed making it an offense to interfere with birds on Reserves established by law, proclamation or *Executive Order*. See also 35 L. D. 11; 34 Stat. 517. But in the majority of cases there was no subsequent legislation in reference to such lands, although the withdrawal orders prevented the acquisition of any private interest in such land until after the order was revoked.

Whether, in a particular case, Congress acted or not, nothing was done by it which could, in any way, be construed as a denial of the right of the Executive to make temporary withdrawals of public land in the public interest. Considering the size of the tracts affected and the length of time they remained in force, without objection, these orders by which *islands, isolated tracts, coal, phosphate and oil lands were withdrawn in aid of legislation,*

furnish, in and of themselves, ample proof of congressional recognition of the power to withdraw.

But that the existence of this power was recognized and its exercise by the Executive assented to by Congress, is emphasized by the fact that the above-mentioned withdrawals were issued after the Report which the Secretary of the Interior made in 1902, in response to a resolution of the Senate calling for information "as to what, if any, of the public lands have been withdrawn from disposition under the settlement or other laws by order of the Commissioner of the General Land Office and *what, if any, authority of law exists for such order of withdrawal.*"

The answer to this specific inquiry was returned March 3, 1902, (Senate Doc. 232, 57th Cong., 1st Sess., Vol. 17). On that date the Secretary transmitted to the Senate the elaborate and detailed report of the Commissioner of the Land Office, who in response to the inquiry as to the authority by which withdrawals had been made, answered that:

"the power of the Executive Department of the Government to make reservations of land for public use, and to temporarily withdraw lands from appropriation by individuals as exigencies might demand, to prevent fraud, to aid in proper administration and in aid of pending legislation is one that has been long recognized both in the acts of Congress and the decisions of the court; . . . that this power has been long exercised by the Commissioner of the General Land Office is shown by reference to the date of some of the withdrawals enumerated. . . . The attached list embraces only such lands as were withdrawn by this office, acting on its own motion, in cases where the emergencies appeared to demand such action in furtherance of public interest and does not include lands withdrawn under express statutes so directed."

The list, which is attached, refers to withdrawal orders about 100 in number, issued between 1870 and 1902.

Many of them were in aid of the administration of the land laws: to correct boundaries; to prevent fraud; to make a classification of the land, and like good—but non-statutory—reasons. Some were made to prevent settlements while the question was being considered as to whether the lands might not be included in a forest reservation to be thereafter established. One in 1889 (referred to also in 28 L. D. 358) was made in order to afford the State of Nebraska an opportunity to procure legislative relief, as in the *Iowa* cases above cited.

This report refers to *Withdrawals* and not to *Reservations*. It is most important in connection with the present inquiry as to whether Congress knew of the practice to make temporary withdrawals and knowingly assented thereto. It will be noted that the Resolution called on the Department to state the extent of such withdrawals and the authority by which they were made. The officer of the Land Department in his answer shows that there have been a large number of withdrawals made for good but for non-statutory reasons. He shows that these 92 orders had been made by virtue of a long-continued practice and under claim of a right to take such action in the public interest "as exigencies might demand. . . ." Congress with notice of this practice and of this claim of authority, received the Report. Neither at that session nor afterwards did it ever repudiate the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.

6. Nor is the position of the appellees strengthened by the act of June 25, 1910 (36 Stat. 847), to authorize the President to make withdrawals of public lands and requiring a list of the same to be filed with Congress.

It was passed after the President's Proclamation of September 27, 1909, and months after the occupation

and attempted location by virtue of which the Appellees claim to have acquired a right to the land. This statute expressly provided that it should not "be construed as a recognition, abridgment or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of this act."

True, as argued, the act provides that it shall not be construed as an "*abridgment* of asserted rights initiated in oil lands after they had been withdrawn." But it likewise provides that it shall not be considered as a "recognition of such rights." There is however nothing said indicating the slightest intent to repudiate the withdrawals already made.

The legislative history of the statute shows that there was no such intent and no purpose to make the Act retroactive or to disaffirm what the agent in charge had already done. The proclamation of September 27, 1909, withdrawing oil lands from private acquisition was of far-reaching consequence both to individuals and to the public. It gave rise to much discussion and the old question as to the authority of the President to make these orders was again raised. Various bills were introduced on the subject and the President himself sent a message to Congress calling attention to the existence of the doubt and suggesting the desirability of legislation to expressly grant the power and ratify what had been done. A bill passed the House containing such ratification and authorizing future withdrawals. When the bill came to the Senate it was referred to a committee and, as its members did not agree in their view of the law, two reports were made. The majority, after a review of the practice of the Department, the acquiescence of Congress in the practice and the decisions of the courts, reported that the President already had a general power of withdrawal and recommended the passage of the pending bill inasmuch

236 U. S.

Opinion of the Court.

as it operated to restrict the greater power already possessed. Sen. Rep. 171 (61st Cong. 2d Session). But having regard to the fact that private persons, on withdrawn land, had raised a question as to the validity of the order and that such question presented a matter for judicial determination, Congress was studious to avoid doing anything which would affect either the public or private rights. It therefore used language which showed not only that the statute was not intended to be retrospective but was not to be construed either as a recognition, enlargement or repudiation of rights like those asserted by Appellees.

In other words, if, notwithstanding the withdrawal, any locator had initiated a right which, however, had not been perfected, Congress did not undertake to take away his rights. On the other hand, if the withdrawal order had been legally made under the existing power, it needed no ratification and if a location made after the withdrawal gave the Appellees no right, Congress, by this statute, did not legislate against the public and validate what was then an invalid location. The act left the rights of parties in the position of these Appellees, to be determined by the state of the law when the proclamation was issued. As heretofore pointed out the long-continued practice, the acquiescence of Congress, as well as the decisions of the courts, all show that the President had the power to make the order. And as was said in *Wolsey v. Chapman*, 101 U. S. 769, the "*withdrawal would be sufficient to defeat a settlement . . . while the order was in force. . . .*"

The case is therefore remanded to the District Court with directions that the decree dismissing the Bill be

Reversed.

MR. JUSTICE McREYNOLDS took no part in the decision of this case.

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

MR. JUSTICE DAY with whom concurred MR. JUSTICE McKENNA and MR. JUSTICE VAN DEVANTER, dissenting.

This case originated in a bill filed by the United States in the United States District Court for the District of Wyoming to restrain trespasses on a certain tract of public petroleum lands in the State of Wyoming and to obtain an accounting for petroleum claimed to have been wrongfully extracted therefrom. The bill sets up ownership in the United States of the land in question, being a tract of 160 acres, and alleges that the land is chiefly valuable for petroleum; that on September 27, 1909, the tract in controversy in common with many others was withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States; and that this was done by an order promulgated on that day by the Secretary of the Interior pursuant to the direction of the President. The order listed townships and sections aggregating more than 3,000,000 acres situated in the States of Wyoming and California. The terms of this order, styled "Temporary petroleum withdrawal No. 5," are:

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

It appears from the averments of the bill that the lands were originally located by certain individuals after the order of withdrawal and on March 27, 1910; that they were entered upon, explored and a well drilled, thereby

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

rendering subject to ready extraction large deposits of petroleum of great value; and that the original claimants caused to be filed and recorded in the records of Natrona County, Wyoming, a certain location certificate evidencing claim and location by them of the land as a petroleum placer-mining claim under and in pursuance of the mining laws of the United States. These parties subsequently assigned their rights to the defendant, The Midwest Oil Company, and certain other persons named. The bill also avers that after the withdrawal order of September 27, 1909, on July 2, 1910, a further order of withdrawal described as "Order of withdrawal. Petroleum reserve No. 8," was made by the President, expressly affirming the order of September 27, 1909.

The law under which the location in question was made (29 Stat. 526) reads:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

Under Rev. Stat., § 2329 provision was made for entering and patenting placer mining claims in like manner as vein or lode claims; and by Rev. Stat., § 2319 "all valuable mineral deposits" were opened to exploration and purchase and the lands containing them to occupation and purchase under regulations prescribed by law and according to the local customs or rules of miners.

While the allegations of the bill do not set out all the steps which led up to the President's order of withdrawal of September 27, 1909, we may not only look to its allegations but read them in the light of public documents embodying the history of the transaction, of which we may take judicial notice. On September 27, 1909, the Secretary of the Interior by direction of the President issued the temporary petroleum withdrawal order No. 5, above set forth.

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

The making of this order was preceded by certain correspondence leading up to it. On February 24, 1908, the Director of the Geological Survey addressed a letter to the Secretary of the Interior, setting forth his opinion as to the superiority of liquid fuel for the Navy, the inadequacy of the coal supply on the Pacific coast and the fact that the demand for oil was greater than the supply and that but little oil land remained under governmental control and that this was being rapidly patented, and his recommendation that the filing of claims to oil lands in California be suspended in order that the Government might continue the ownership of the valuable supplies of liquid fuel. On the seventeenth of September, 1909, the Director sent another letter to the Secretary of the Interior, enclosing a copy of his earlier letter, and saying, in substance, that the arguments contained in that letter had been reinforced by the Survey's Conservation Report on the petroleum resources of the United States, which showed that at that time the production exceeded the demand of the trade, and inasmuch as the disposal of the public petroleum lands at nominal prices encouraged overproduction, legislation providing for the sane development of such resources should be enacted. He also stated that the conservation of the petroleum supply demanded a law providing for the disposal of the oil remaining in the public lands in terms of barrels of oil rather than in acres of land; and further that, considering the use of lubricating oil and of fuel oil for the navy, there was an immediate necessity for conserving a proper supply of petroleum for the Government's use, and he recommended the suspension of the filing of claims to oil lands in California pending legislation on the subject. He also called attention to the fact that the Commissioner of the General Land Office, acting upon his report classifying certain oil lands in California, had issued instructions withholding such oil lands from agricultural entry pending considera-

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

tion of legislation. And on the same day the Secretary of the Interior addressed a letter to the President calling his attention to the subject of conservation of the petroleum resources of the public domain, especially with reference to the requirements of the Navy, repeating the substance of the Director's letter and stating that other lands than those mentioned in the Director's letter had also been withdrawn from entry in California, and concluding that legislation was needed which would assure conservation of an adequate supply of petroleum for the Government's needs, but which, he believed, would not interfere with the private development of the California oil pools, and therefore the necessity for temporary withdrawals of the land from entry. Shortly thereafter, on September 26, 1909, the Secretary of the Interior telegraphed to the Acting Secretary from Salt Lake City where he had seen the President, as follows:

"Have conferred with President respecting temporary withdrawals covering oil lands. If present withdrawals permit mining entries being made of such lands wish the withdrawals modified at once to prohibit such disposition pending legislation."

The following day the Acting Secretary telegraphed to the Secretary at Helena, Montana:

"Telegram 26th received. California and Wyoming petroleum withdrawals heretofore made permit mining locations. Following your direction I have temporarily withdrawn from all forms of location and entry 2,871,000 acres in California and 170,000 acres in Wyoming, all heretofore withdrawn for classification. My withdrawal prevents all forms of acquisition in future and holds the land in statu quo pending legislation."

And thereupon the withdrawal order of September 27, 1909, above set forth, was promulgated.

It is to be observed that the lands here in controversy are situated in the State of Wyoming. There was no

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

suggestion that such lands would ever be needed as a basis of oil supply for the Navy. They were withdrawn solely upon the suggestion that a better disposition of them could be made than was found in the existing acts of Congress controlling the subject.

From this statement it is evident that the first question to be decided concerns the validity of the President's withdrawal order of September 27, 1909, and it is necessary to determine whether that order was within the authority of the President and had the effect to withdraw the land in controversy from location under the mineral land law, or whether, as held in the court below, that order had no force and effect to prevent persons from acquiring rights under the then existing statutes of the United States concerning the subject.

The Constitution of the United States in Article IV, § 3, provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In this section the power to dispose of lands belonging to the United States is broadly conferred upon Congress, and it is under the power therein given that the system of land laws for the disposition of the public domain has been enacted. *United States v. Gratiot*, 14 Pet. 526, 536-7; *United States v. Fitzgerald*, 15 Pet. 407, 421; *Van Brocklin v. Tennessee*, 117 U. S. 151, 168; *Wisconsin R. R. v. Price County*, 133 U. S. 496, 504. In the last case this court said:

"The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."

It is contended on behalf of the Government that the power of the President to make such orders as are here in

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

question has grown up from the authorization of Congress in its legislation and because of its long sanction by acquiescence in the exercise of such executive authority, so that, if it be admitted that the authority of the President to deal with the public lands must come from Congress, the sanction which such action of the Executive has received in the course of many years of legislation and congressional acquiescence is as effective as though the express authority had been conferred by law. In aid of this argument the general course of legislation is pointed to, and the decisions of this court and opinions of Attorneys General in connection with certain acts are cited. Upon the other hand it is contended that if these acts are to be taken as the general declaration of congressional intent upon the subject, they contain express authorization of the President to make withdrawals when Congress wishes to confer such power. Some of the instances referred to are set out in the margin.¹

¹The Government asserts that reservations by the Executive for Indian purposes, irrespective of the existence of statutory authority, are found collected in *The Public Domain*, pp. 727, 1252; 1 Kappler's *Laws and Treaties*, p. 801; and for military purposes in *The Public Domain*, pp. 748, 1258; *Laws of the United States of a Local and Temporary Character*, vol. 2, p. 1171. (Whether or not these orders were preceded by Congressional authority does not definitely appear.) It also recites several executive withdrawals of land for uses related to military purposes, such as lands supplying fuel, water, etc., to military posts, and also a withdrawal to conserve a supply of building stone for harbor improvements. Another instance cited: Where Congress by an appropriation act of June 18, 1878 (20 Stat. 152), had directed the Secretary of War to cause an examination to be made of the sources of the Mississippi River, among others, to determine the practicability and cost of reservoirs for improving its navigation, the Secretary it is said made his report and withdrew certain lands in aid of his report, in the hope that they would be "affected in the event of affirmative congressional action upon said report"; and additional lands were withdrawn subsequently for the same purpose, but after appropriations for the construction of the reservoirs had been made

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U.

It is thus explicitly recognized, as was already apparent from the terms of the Constitution itself, that the sole authority to dispose of the public lands was vested in

by the act of June 14, 1880 (21 Stat. 180). Attention is also called to withdrawals for a number of purposes, as to correct surveys; to avoid conflicts with private claims; to prevent frauds; to ascertain character of land, etc., shown by a letter from the Acting Secretary of the Interior, dated March 3, 1902, found at p. 7463 of vol. 45, Congressional Record. The reports of the Secretary of the Interior and the Commissioner of the General Land Office are cited to the effect that supposed oil lands in California were withdrawn from agricultural entry in aid of an investigation of their character and to prevent unlawful application of lieu sections (1900, pp. LI, 75, and 1901, pp. LXIII, 87); that large quantities of coal land were withdrawn to verify the existence of coal deposits because of serious frauds (1907, pp. 13, 251); that temporary reservation was made of the "Petrified Forest" in Arizona for a proposed national park (Commissioner's Report 1900, p. 87); and that temporary withdrawals were made for state parks in California and Michigan (Commissioner's Report, 1902, p. 319), all of which were reported to Congress. The land including the Wind Cave in South Dakota was reserved (Commissioner's Report, 1900, p. 91) and later made a national park by the act of January 9, 1903 (32 Stat. 765). The President had created certain reservations for the protection of birds (Rep. Sec. Int. 1909, p. 43), and subsequently an act was passed making it an offense to interfere with birds or their eggs "on any lands of the United States which have been set apart or reserved as breeding grounds for birds by any law, proclamation, or Executive order" (34 Stat. 536). The Secretary of the Interior had directed that all applications to purchase certain isolated tracts should be suspended (34 L. D. 245), and subsequently an act providing for the disposition of disconnected tracts was approved by Congress (34 Stat. 517). In aid of a bill to authorize Wisconsin to select certain lands, the President withdrew a large area in that State, and the bill was later passed (35 L. D. 11; 34 Stat. 517). Coal lands in Alaska were withdrawn from entry by direction of the President (35 L. D. 572), which had been thrown open to entry by Congress (33 Stat. 525), and the propriety of this withdrawal was approved by Congress (35 Stat. 424). To support its statement that general recognition of the executive authority is found in a number of statutes the Government cited: The townsite law of March 2, 1867 (14 Stat. 541), which contained a proviso that "the provisions of this act shall not apply to military or other reservations

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

the Congress and in no other branch of the Federal Government. The right of the Executive to withdraw lands which Congress has declared shall be open and free to settlement upon terms which Congress has itself prescribed, is said to arise from the tacit consent of Congress in long acquiescence in such executive action resulting in an implied authority from Congress to make such withdrawals in the public interest as the Executive deems proper and necessary. There is nothing in the Constitution suggesting or authorizing such augmentation of executive authority or justifying him in thus acting in aid of a power which the framers of the Constitution saw

heretofore made by the United States, nor to reservations for light-houses, customhouses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the land office by title derived from the Crown of Spain, or otherwise"; and the act of February 8, 1887 (24 Stat. 388), providing for the allotment of lands in severalty to Indians on the various reservations and for other purposes, the opening paragraph of which read: "That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized. . . ."

The Government says, however, that "there is no publication which can be relied on in determining whether a given Executive order was preceded by statutory authority," and admits that it is possible that in some of the cases cited there was antecedent statutory authority.

The defendant appends to its brief a list of statutes giving discretionary power to the Executive to make withdrawals, those relating to military or analogous purposes being, 1 Stat. 252; 1 Stat. 352; 1 Stat. 555; 2 Stat. 453; 2 Stat. 547; 2 Stat. 750; 4 Stat. 687; 9 Stat. 500; 10 Stat. 27; 10 Stat. 608; those for Indian purposes being, 4 Stat. 411; 10 Stat. 238; 11 Stat. 401; 12 Stat. 819; 13 Stat. 40; for a lighthouse, 1 Stat. 54; with reference to salt springs, 2 Stat. 235; 2 Stat. 280; 2 Stat. 394; and lead mines, 2 Stat. 449; for town sites, 3 Stat. 375; 12 Stat. 754; for reservoirs, 25 Stat. 526; and irrigation work, 32 Stat. 388; for lands containing timber for naval purposes, 3 Stat. 347; and for forest reserves, 26 Stat. 1103; 30 Stat. 36.

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

fit to vest exclusively in the legislative branch of the Government.

It is true that many withdrawals have been made by the President and some of them have been sustained by this court, so that it may be fairly said that, within limitations to be hereinafter stated, executive withdrawals have the sanction of judicial approval, but, as we read the cases, in no instance has this court sustained a withdrawal of public lands for which Congress has provided a system of disposition, except such withdrawal was—(a) in pursuance of a policy already declared by Congress as one for which the public lands might be used, as military and Indian reservations for which purposes Congress has authorized the use of the public lands from an early day, or (b) in cases where grants of Congress are in such conflict that the purpose of Congress cannot be known and therefore the Secretary of the Interior has been sustained in withdrawing the lands from entry until Congress had opportunity to relieve the ambiguity of its laws by specifically declaring its policy.

It is undoubtedly true that withdrawals have been made without specific authority of an act of Congress, but those which have been sustained by this court, it is believed, will be found to be in one or the other of the categories above stated. On the other hand, when the executive authority has been exceeded this court has not hesitated to so declare, and to sustain the superior and exclusive authority of Congress to deal with the public lands.

The first decision of this court which has come to our attention in which this matter was dealt with is *Wilcox v. Jackson*, 13 Pet. 498, decided in 1839. That case involved a controversy concerning the lands occupied by the military post called Fort Dearborn in Cook County, Illinois. The lands had been used for many years as a military post and an Indian agency, and in 1824 were reserved by

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

the Commissioner of the General Land Office at the request of the Secretary of War for military purposes. It also appears that prior to May 1, 1834, the Government built a lighthouse on part of the land. When the suit was brought by Jackson to recover them they were in the possession of Wilcox, commander of the post, who claimed the right to hold them as an officer of the United States under the orders of the Secretary of War. The claim asserted by Jackson arose from the preëmption allowed to his lessor's predecessor in title under the act of June 19, 1834 (c. 54, 4 Stat. 678), which revived the act of May 29, 1830 (c. 208, 4 Stat. 420), which provided that "no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several states, . . . or which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated, for any purpose whatsoever." The court, after stating that lands which had been appropriated for any purpose whatsoever were exempt from preëmption and that the lands in question had been in fact appropriated, reviewed legislation authorizing the President to erect fortifications and to establish trading houses and, in concluding that the appropriation had been made by authority of law, said (p. 512):

"We thus see that the establishing [*of*] trading houses with the Indian tribes, and the erection of fortifications in the west, are purposes authorized by law; and that they were to be established and erected by the President. But the place in question is one at which a trading house has been established, and a fortification or military post erected. It would not be doubted, we suppose, by any one, that if Congress had by law directed the trading house to be established and the military post erected at Fort Dearborn, by name; that this would have been by authority of law. But instead of designating

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

the place themselves, they left it to the discretion of the President, which is precisely the same thing in effect. Here then is an appropriation, not only for one but for two purposes, of the same place by authority of law. But there has been a third appropriation in this case by authority of law. Congress, by law, authorized the erection of a lighthouse at the mouth of Chicago river, which is within the limits of the land in question, and appropriated \$5000 for its erection; and the case agreed states that the lighthouse was built on part of the land in dispute before the 1st of May, 1834. We think, then, that there has been an appropriation, not only in fact but in law."

The court, after remarking that Congress must have known of the authority which had been given to the President by former laws to establish trading houses and military posts and that a military post had long been established at Fort Dearborn, said (p. 514): "They seem therefore to have been studious to use language of so comprehensive a kind, in the exemption from the right of preëmption, as to embrace every description of reservation and appropriation which had been previously made for public purposes."

With reference to the reservation of 1824 the court merely said (p. 512): "We consider this, too, as having been done by authority of law; for amongst other provisions in the act of 1830, all lands are exempted from preëmption which are reserved from sale by order of the President." (And the court held that the act of the Secretary of War was that of the Executive.) But the court later laid down the rule that when lands have been legally appropriated, they immediately become severed from the mass of public lands and that no subsequent law or proclamation would embrace them, although no reservation had been made of them. From that case, therefore, the following propositions are deduced: That where there

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

is a legal appropriation, reservation is unnecessary, but that the reservation in that case had been ratified by a subsequent act of Congress. And that the appropriation of the land in controversy in that case had been by authority of law, *i. e.*, power placed in the President by Congress by acts passed before and after the exertion of such power by the President.

Grisar v. McDowell, 6 Wall. 363, is another case relied upon. There had been a controversy between the City of San Francisco and the United States with reference to the extent of the pueblo lands belonging to the former, which had been determined by an order of court confirming the title of the City subject to the exception of lands "reserved or dedicated to public uses by the United States" and by the Act of Congress of March 8, 1866 (c. 13, 14 Stat. 4), relinquishing the claim of the United States subject to the reservation in the decree. *Grisar*, claiming title from the City, sought to recover possession of land which had been reserved by order of the President for public purposes and which was held by the defendant, an officer in the army of the United States, commanding the military department of California, who had entered upon the premises and held them under the order of the Secretary of War as part of the public property of the United States reserved for military purposes. In dealing with the right of the President to make the reservation the court first held that it made no difference whether or not the President possessed sufficient authority to make the reservation, because being a part of the public domain they were excluded from lands affirmed to the State under which the plaintiff claimed. In dealing with the power of the President the court said (6 Wall., p. 381):

"But further than this: from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

the United States to be reserved from sale and set apart for public uses."

In this connection the court cited acts of Congress recognizing the authority of the President, among others, the preemption act of May 29, 1830, *supra*, in which it was provided that the right of preemption should not extend to lands reserved from sale by act of Congress or by order of the President, and the act of September 4, 1841 (c. 16, 5 Stat. 453, 456), exempting lands reserved by any treaty, law or proclamation of the President, and of March 3, 1853 (c. 143, 10 Stat. 244, 246), excepting lands appropriated under authority of the act or reserved by competent authority, and held that this reservation by competent authority meant the authority of the President, and those acting under his direction. Furthermore, the court held that the action of the President in making the reservations had been indirectly approved by Congress by appropriating moneys for the construction of fortifications and other public works upon them, and that the reservations embraced lands upon which public buildings had been erected. The language of Mr. Justice Field above quoted as to the authority of the President has been frequently quoted in subsequent opinions of Attorneys General, and has been made the basis of opinions for broad authority in the President. It is to be observed, however, that in that case the law, recited in the opinion as giving the power of reservation, contained congressional authority directly to the President or competent authority, which it was held meant the President, and the statement was added that the action of the President had been approved by Congress appropriating money for fortifications and other public works.

The Government also relied upon a series of cases in this court which may be called the *Des Moines River Cases*, beginning with *Wolcott v. Des Moines Co.*, 5 Wall. 681, and followed by *Riley v. Welles*, 154 U. S. 578; *Williams v.*

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

Baker, 17 Wall. 144; *Homestead Co. v. Valley Railroad*, 17 Wall. 153; *Wolsey v. Chapman*, 101 U. S. 755; *Litchfield v. Webster County*, 101 U. S. 773; *Dubuque & Pac. R. R. v. Des Moines Valley R. R.*, 109 U. S. 329; *Bullard v. Des Moines &c. R. R.*, 122 U. S. 167; *United States v. Des Moines Nav. &c. Co.*, 142 U. S. 510. In the original case, 5 Wall. 681, it is shown that the cases grew out of an act of Congress of August 8, 1846 (c. 103, 9 Stat. 77), granting to the then Territory of Iowa for the purpose of aiding it in improving the navigation of the Des Moines River from its mouth to the Raccoon Fork, "one equal moiety, in alternate sections, of the public lands, in a strip five miles in width on each side of said river." This ambiguous description gave rise to the controversy which appeared from time to time in the cases mentioned and arose from the doubt whether the grant to Iowa included lands above the Raccoon Fork. Early in the year 1848 the Commissioner of the General Land Office decided that the grant extended beyond Raccoon Fork, but later in that year the President by proclamation ordered the sale of some of this land above the Fork in the following October. On June 16, 1849, however, the Secretary of the Treasury, having construed the grant to include the lands above the Fork, directed that they should be reserved from the sale. The control of the General Land Office having passed to the Secretary of the Interior, on April 6, 1850, he reversed the decision of the Secretary of the Treasury, but directed that the lands embraced within the State's selections should be reserved from sale. The matter was before two Presidents and their cabinets, with different results, and finally, on October 29, 1851, the Secretary of the Interior held that in view of the great conflict among executive officers of the Government and in view of the opinion of eminent jurists which had been presented to him in favor of the construction contended for by the State, he was willing to recognize the claim of the

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

State and approve the selections, without prejudice to the rights, if any there be, of other parties. The history of subsequent legislation, not necessary to now recite, is given in the opinion, and then the act of May 15, 1856 (c. 28, 11 Stat. 9), upon which the plaintiff relied was considered, in which was found the provision that "any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever," were reserved from the operation of the act. This was a grant made to the railroads which it was admitted covered the tract in controversy, unless excluded by the proviso. It was held that the lands had been reserved by competent authority, the court saying (5 Wall., p. 688):

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines River—first, by the Secretary of the Treasury, when the Land Department was under his supervision and control, and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and Cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the Land Department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by Congress for any of these public purposes to a State, notice is given by the commissioner of the land office to the registers and receivers to

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

It is therefore apparent that this reservation was sanctioned, because it had become the duty of the officers, who were by law charged with the administration of the grants and required to give effect to them, to withhold the lands from sale and reserve them because of the doubt of the extent of the grant of 1846. In other words, if the lands had been granted to the State of Iowa, it could not possibly have been the intention of Congress to subject them to selection or grant under other laws, and this court said that the power to reserve them arose by necessary implication from the grant of 1846.

In *Riley v. Welles*, *supra*, involving a claim of title under the preëmption section of the act of September 4, 1841, to land covered by the withdrawal under the act of 1846, this court followed *Wolcott v. Des Moines Co.*, *supra*, and repeated its decision as to the effect of the reservation.

In *Williams v. Baker*, 17 Wall. 144, and *Homestead Co. v. Valley Railroad*, 17 Wall. 153, both involving title to lands claimed under the grant of 1856, as against titles founded on the 1846 act, as did the *Wolcott Case*, the court affirmed the validity of the reservation under the act of 1846, for the reason that the proviso in the act of 1856 prevented the railroad from acquiring the land.

In *Wolsey v. Chapman*, 101 U. S. 755, where the controversy was, whether the grant to the Territory of Iowa, by the act of September 4, 1841, *supra*, of the right to select a quantity of lands for internal improvement pur-

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

poses, excepting such as were or might be "reserved from sale by any law of Congress or proclamation of the President," permitted the selection of certain lands covered by the reservation in these cases, it was held (pp. 768-9):

"They were reserved also in consequence of the act of 1846. The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land-officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Riley v. Wells*, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

* * * * *

"The truth is, there can be no reservation of public lands from sale except by reason of some treaty, law, or authorized act of the Executive Department of the government."

Litchfield v. Webster County, supra, involved the question as to whether the title to the lands above the Fork vested in the State by the act of 1846, for purpose of taxation, and, affirming the previous cases, the court held that the action of the Executive Department of the General Government reserved the land above the Fork so that it "did not pass to the State when selected as school lands under the act of 1841, or as railroad lands by the grant of 1856, and were not open to preëmption entry," and the Executive order "simply retained the ownership in the United States."

The case of *Dubuque &c. R. R. v. Des Moines Valley*

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

R. R., *supra*, also involved a controversy as to whether title vested under the river or railroad grant, and the court held that the validity of the reservation was no longer an open question.

The history of the matter was restated in *Bullard v. Des Moines &c. R. R.*, *supra*, it being made to appear especially that the order withdrawing the land was in effect during all the time up to the passage of the act of July 12, 1862 (c. 161, 12 Stat. 543), and that after the decision in the case of *Dubuque & Pacific R. R. v. Litchfield*, 23 Howard, 66, had determined that Congress had not by the act of 1846 granted the land above the Fork to Iowa, the Commissioner of the General Land Office by notice of May 18, 1860, continued the reservation, notwithstanding the decision just referred to. And it was held that the resolution of Congress of March 2, 1861 (12 Stat. 251), did not end the reservation and that claims inaugurated after that resolution and before the passage of the act of July 12, 1862 were subject to the reservation. The court said (122 U. S., p. 170):

"This court has decided in a number of cases, in regard to these lands, that this withdrawal operated to exclude from sale, purchase, or preëmption all the lands in controversy, and unless the case we are about to consider constitutes an exception, it has never been revoked.

* * * * *

"During all this controversy there remained the order of the Department having control of the matter, withdrawing all the lands in dispute from public sale, settlement or preëmption. This withdrawal was held to be effectual against the grant made by Congress to the railroad companies in 1856, because that act contained the following proviso:

"That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aid-

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

ing in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.'"

The court quoted the notice of the Commissioner of the General Land Office of May 18, 1860, that the land above the Fork "which has been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved, for the time being, from sale or from location, by any species of script or warrants, notwithstanding the recent decision of the Supreme Court against the claim. This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper." And the court said (p. 173):

"It will thus be seen that, notwithstanding the decision of the Supreme Court of the United States in the winter of 1860, the land office determined that the reservation of these lands should continue for the purpose of securing the very action by Congress which the State of Iowa was soliciting, and it is not disputed by counsel for the appellant in this case that this was a valid continuation of such reservation and that during its continuance the pre-emptions under which the plaintiff claims could not have been made. . . .

"We do not think the joint resolution had the effect to end the reservation of these lands from public entry. . . .

"This is not the way in which a reservation from sale or preëmption of public lands is removed. In almost

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

every instance, in which such a reservation is terminated, there has been a proclamation by the President that the lands are open for entry or sale, and in most instances they have first been offered for sale at public auction. It cannot be seen, from anything in the joint resolution, that Congress either considered the controversy ended or intended to remove the reservation instituted by the Department. Its immediate procedure at the next session to the full consideration of the whole subject shows that it had not ceased to deal with it; that the reason for this withdrawal or reservation continued as strongly as before, and it cannot be doubted that the subject was before Congress, as well as before its committees, and that the act of July 12, 1862, was, for the first time, a conclusion and end of the matter so far as Congress was concerned."

The last of the *Des Moines River Cases*, *United States v. Des Moines &c. Co.*, *supra*, was a suit instituted by the United States to quiet its title to certain of the lands conveyed by the State of Iowa to the Navigation Company and others, claiming that the trust had not been performed, and, after reviewing the history of the matter and the previous cases at considerable length, the court again stated the effect of the reservation (142 U. S., p. 528):

"The validity of this reservation was sustained in the case of *Wolcott v. Des Moines Company*, 5 Wall. 681, decided at December term, 1866. In that case it was held that, even in the absence of a command to that effect in the statute, it was the duty of the officers of the Land Department, immediately upon a grant being made by Congress, to reserve from settlement and sale the lands within the grant; and that, if there was a dispute as to its extent, it was the duty to reserve all lands which, upon either construction, might become necessary to make good the purposes of the grant. This ruling as to the power

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

and duty of the officers of the Land Department has since been followed in many cases. *Bullard v. Des Moines & Fort Dodge Railroad*, 122 U. S. 167, and cases cited in the opinion."

In the case now before us Congress in the statutes referred to had expressly subjected these lands to the operation of the placer mining law and had authorized their exploration for oil and their location, entry and purchase as mineral lands. Congress had in this way exercised its power and manifested its will and such was the situation when the withdrawal in question was made. Deriving the aim of the Executive from the various documents to which we have referred it may be fairly deduced that the prevailing purpose (and that was the sole purpose so far as the lands here involved were concerned) in making the withdrawal was to anticipate that Congress, having the subject-matter brought to its attention, might and would provide a better and more economical system for the disposition of such public lands, and secondarily to preserve some of the oil lands in California as a basis of naval supply in the future, the latter purpose not at that time declared or recognized by Congress. For these purposes the President had no express authority from Congress; in fact, such is not claimed. The authority which may arise by implication, we think, must be limited to those purposes which Congress has itself recognized by either direct legislation or long continued acquiescence as public purposes for which such withdrawals could be made by the Executive. That the President might by virtue of his executive authority take action to preserve public property or in aid of the execution of the laws reserve tracts of land for definitely fixed public purposes, declared by Congress, such as military or Indian reservations, may be conceded; but we are unable to find sanction for the action here taken in withdrawing a large part of the public domain from the operation of the public land laws in the

236 U. S. DAY, McKenna, and VAN DEVANTER, JJ., dissenting.

power inherent in this office as created and defined by the Constitution or in any way conferred upon him by the legislation of Congress or in that long acquiescence in the exercise of authority sanctioned by Congress in such manner as to be the equivalent of a grant to the President.

The constitutional authority of the President of the United States (Art. II, §§ 1, 3), includes the executive power of the Nation and the duty to see that the laws are faithfully executed. "The President 'shall take care that the laws be faithfully executed.' Under this clause his duty is not limited to the enforcement of acts of Congress according to their express terms. It includes 'the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.'" Cooley's Principles of Constitutional Law, p. 121; *In re Neagle*, 135 U. S. 1. The Constitution does not confer upon him any power to enact laws or to suspend or repeal such as the Congress enacts. *Kendall v. United States*, 12 Pet. 524, 613. The President's powers are defined by the Constitution of the United States, and the Government does not contend that he has any general authority in the disposition of the public land which the Constitution has committed to Congress, and freely concedes the general proposition as to the lack of authority in the President to deal with the laws otherwise than to see that they are faithfully executed.

As we have said, while this court has sustained certain withdrawals made by the Executive, in carrying out a policy for which the use of the public lands had been indicated by congressional legislation, and has sustained the right of withdrawal where conflicting grants had been made by Congress and additional legislation was needed to expressly declare the purpose of Congress, the court has refused to sustain withdrawals made by the Executive branch of the Government when in contravention of the

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

policy for the disposition of the lands declared in acts of Congress. In *Southern Pacific R. R. v. Bell*, 183 U. S. 675, it was held that the Secretary of the Interior had no authority to withdraw lands within the indemnity limits of a grant from sale or preëmption, when Congress had indicated its purpose that such lands might be taken up by settlers before the road had exercised its right of selection. In *Brandon v. Ard*, 211 U. S. 11, the conflict was between an attempted withdrawal in aid of a land grant and a homestead settlement three years later, and this court held that the withdrawal of the lands from sale or settlement prior to the definite location of the road, and before they were selected to supply deficiencies in place or granted limits, was without authority of law, and that the homestead settlement, under existing laws of Congress, must prevail over such attempted withdrawal. The same principle was declared and enforced in *Osborn v. Froyseth*, 216 U. S. 571.

In *Lockhart v. Johnson*, 181 U. S. 516, 520, Mr. Justice Peckham, speaking for the court, tersely stated the rule:

"Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an executive withdrawal under such authority, either expressed or implied."

We think the rule thus stated is the result of the previous decisions of this court, when properly construed, and is consistent with the authority over the public lands given to Congress under the Constitution, and properly rests with the executive power to deal with such lands by way of withdrawal upon the express or implied authority of the Congress. In other words, it may be fairly said that a given withdrawal must have been expressly authorized by Congress or there must be that clear implication of

U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

Congressional authority which is equivalent to express authority; and when such authority is wanting there can be no executive withdrawal of lands from the operation of an act of Congress which would otherwise control.

The message of the President of January 14, 1910, indicates that he doubted his authority to make such withdrawals. In that message, after referring to the lax manner in which the Government had been disposing of the public lands under the mining and other acts and the need of properly classifying lands and revising the mode of disposing of the oil and other deposits in them with greater regard to the public interests, but without hindering development, he said:

"The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statutes would be detrimental to the public interest, is not clear or satisfactory. This power has been exercised in the interest of the public with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions. Unfortunately, Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to validate the withdrawals that have been made by the Secretary of the Interior and the President, and to authorize the Secretary of the Interior temporarily to withdraw lands pending submission to Congress of recommendations as to legislation to meet conditions or emergencies as they arise. . . .

"I earnestly recommend that all the suggestions which the [Secretary of the Interior] has made with respect to these lands shall be embodied in statutes, and, especially, that the withdrawals already made shall be validated so far as necessary and that the authority of the Secretary of the Interior to withdraw lands for the pur-

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

pose of submitting recommendations as to future dispositions of them where new legislation is needed shall be made complete and unquestioned."

After the receipt of this message a considerable number of bills being before the Senate and House of Representatives upon the subject, the matter was taken up and in the House of Representatives a bill was passed providing for withdrawals under certain conditions and providing that "All withdrawals heretofore made and now existing are hereby ratified and confirmed as if originally made under this act." The bill in that form did not pass the Senate. It was, however, adopted in a materially modified form in the act of June 25, 1910 (c. 421, 36 Stat. 847); which reads:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

"SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, That this act shall not be construed as a

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made. And provided further, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado or Wyoming, except by Act of Congress.

"SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals."

The reports of the Senate Committee show that its members were divided as to the authority of the President to make the withdrawal order in question. The majority report stated that in any view the President had the authority without additional legislation; the minority reached the opposite conclusion.

It is to be noted that the act of June 25, 1910, conferred specific authority for the future upon the President, but gave no approval to the withdrawal of September 27, 1909, containing instead an express provision that the act should not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after the withdrawal of such lands made prior to the passage of the act. While the order of

DAY, McKENNA, and VAN DEVANTER, JJ., dissenting. 236 U. S.

September 27, 1909, withdrew the lands from all form of settlement, location, sale, entry or disposal under the mineral or nonmineral public land laws, the act of June 25, 1910, excepts from the power of withdrawal conferred upon the President lands embraced in any lawful homestead or desert-land entry theretofore made or upon which any valid settlement had been made and was being maintained and perfected pursuant to law. Furthermore, the act provides that the rights of a bona fide occupant or claimant of oil or gas bearing lands complying with the provisions of the statute relating thereto shall not be affected or impaired by a subsequent order of withdrawal. In this statute there certainly is no congressional assent to the executive withdrawal of September 27, 1909. The validation or ratification asked in the President's message was withheld and only restricted authority for the future was granted in the act of June 25, 1910; not only so, but the rights of the locators involved in this case were preserved to whatever extent they existed in the absence of a ratification of the withdrawal. When express ratification is thus asked and refused, in our view no power by implication can be fairly inferred. *Barden v. Northern Pacific Railroad*, 154 U. S. 288, 317; *Duroursseau v. The United States*, 6 Cranch, 307, 318; *Eyster v. Centennial Board of Finance*, 94 U. S. 500, 503. The act of June 25, 1910, neither ratified the withdrawal of September 27, 1909, nor empowered the President so to do by his order of July 2, 1910.

The Government of the United States is one of limited powers. The three coördinate branches of the Government are vested with certain authority, definite and limited, in the Constitution. This principle has often been enforced in decisions of this court, and the apt words of Mr. Justice Miller, speaking for the court in *Kilbourn v. Thompson*, 103 U. S. 168, 190, have been more than once quoted with approval:

236 U. S. DAY, McKENNA, and VAN DEVANTER, JJ., dissenting.

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or National, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

These principles ought not to be departed from in the judicial determinations of this court, and their enforcement is essential to the administration of the Government, as created and defined by the Constitution. The grant of authority to the Executive, as to other departments of the Government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the Government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the Government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another.

In our opinion, the action of the Executive Department in this case, originating in the expressed view of a subordinate official of the Interior Department as to the desirability of a different system of public land disposal than that contained in the lawful enactments of Congress,

did not justify the President in withdrawing this large body of land from the operation of the law and virtually suspending, as he necessarily did, the operation of that law, at least until a different view expressed by him could be considered by the Congress. This conclusion is reinforced in this particular instance by the refusal of Congress to ratify the action of the President, and the enactment of a new statute authorizing the disposition of the public lands by a method essentially different from that proposed by the Executive.

For the reasons expressed, we are constrained to dissent from the opinion and judgment in this case.
